

5. 2921
No. 14606

**United States
Court of Appeals**
For the Ninth Circuit.

**FRANK M. CHICHESTER, Trustee in Bank-
ruptcy for the Estate of KENNETH P.
SCHMIDT BUILDERS, INC., Bankrupt,**
Appellant,

vs.

**CLARENCE E. POLIKOWSKY, WINNIFRED
POLIKOWSKY, KENNETH P. SCHMIDT
and MARY WILKINS SCHMIDT,**
Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Southern District of California, Central
Division

In Bankruptcy No. 57,339

In the Matter of:

KENNETH P. SCHMIDT BUILDERS, INC.,
Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia:

The verified petition of Robert J. Keller, Orban
Lumber Company, a corporation, and E. A. Lynch,
respectfully show:

I.

That the alleged bankrupt, Kenneth P. Schmidt
Builders, Inc., now has, and has had his principal
place of business at 513-A South Atlantic Boulevard,
Monterey Park, California.

II.

That the alleged bankrupt is engaged in the busi-
ness of general contracting and construction.

III.

That the alleged bankrupt, Kenneth P. Schmidt
Builders, Inc., is now and at all times mentioned

herein and has been a corporation duly organized under and by virtue of the laws of the State of California.

IV.

That your petitioners are creditors of the said alleged bankrupt and hold provable claims against it, fixed as to liabilities [2*] and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by them, to the sum of more than \$500.00.

V.

That your petitioner, E. A. Lynch, is the duly appointed, qualified and acting trustee in bankruptcy for the estate of Percy F. Bennett, d/b/a Bennett Roofing Company, a bankruptcy proceeding presently pending in the United States District Court for the Southern District of California, Central Division, being Bankruptcy No. 56,462-PH.

VI.

That the nature and amount of your petitioners' claims are as follows:

That the alleged bankrupt is indebted to your petitioner, Robert J. Keller, dba Keller Supply Co., in the sum of \$1635.32 as and for goods, wares and merchandise owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$1635.32, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, Robert J. Keller, dba

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Keller Supply Co., was an individual doing business under the fictitious name and style of Keller Supply Co.

The alleged bankrupt is indebted to your petitioner, Orban Lumber Company, a California corporation, in the sum of \$4136.13 as and for goods, wares and merchandise owing by said alleged bankrupt to your petitioner within four years last past of the reasonable market value of \$4136.13, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, Orban Lumber Company, was, has been and now is a California corporation.

The alleged bankrupt is indebted to your petitioner, E. A. Lynch, in the sum of \$782.48 as and for goods, wares and merchandise owing by the said alleged bankrupt to your petitioner [3] within four years last past of the reasonable market value of \$782.48, no part of which has been paid, and the whole thereof is due, owing and unpaid; and that at all times herein mentioned, your petitioner, E. A. Lynch, was, has been and now is, as indicated hereinbefore, the duly appointed, qualified and acting trustee in bankruptcy for Percy F. Bennett, dba Bennett Roofing Company.

VII.

Your petitioners allege that the alleged bankrupt owes debts in excess of the sum of \$1000.00 and is insolvent at the present time and at the times mentioned hereinafter, and that the said alleged bank-

rupt has committed acts of bankruptcy as follows:

That the alleged bankrupt herein conveyed, transferred certain of its property with the intent to hinder, delay or defraud its creditors, or any of them. That among other alleged transfers and conveyances with intent to hinder, delay and defraud, your petitioners are informed and believe that the said alleged bankrupt caused to be transferred certain funds to its president, Kenneth P. Schmidt, which funds were invested in real property, and which your petitioners are informed and believe and therefore allege were invested in real property and a yacht for the purpose of preventing creditors attaching or reaching those funds or the property into which they were converted. Your petitioners are further informed and believe that Kenneth P. Schmidt caused the alleged bankrupt corporation to transfer other funds to him individually and personally belonging to the alleged bankrupt corporation so that the said funds would be beyond the reach of creditors of the alleged bankrupt.

Petitioners are further informed and believe and therefore allege that the alleged bankrupt herein transferred with intent to hinder, delay or defraud his creditors, or any of them, a race horse shortly prior to the commencement of this proceeding, which transferral was made without consideration or benefit to this [4] alleged bankrupt but for the purpose of placing the said asset beyond the reach of creditors pressing the bankrupt for payment and threatening attachment.

The alleged bankrupt has paid payments while

insolvent to one or more of its creditors with intent to prefer such creditors over other creditors.

Wherefore, your petitioners pray that the service of this petition, together with the subpoena, may be made upon the said alleged bankrupt as provided by the Bankruptcy Act, and that he may be adjudged by this Court to be a bankrupt within the purview of the said Act.

Dated: July 9, 1953.

ROBERT J. KELLER, dba
KELLER SUPPLY CO.,
By /s/ ROBERT J. KELLER.

ORBAN LUMBER COMPANY,
a Corporation,
By /s/ STANLEY L. HAHN,
Secretary.

E. A. LYNCH,
Trustee in Bankruptcy for the Estate of Percy F.
Bennett, dba Bennett Roofing Company,
By /s/ E. A. LYNCH.

CRAIG, WELLER &
LAUGHARN,
By /s/ C. E. H. McDONNELL,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed July 10, 1953, U.S.D.C. [5]

[Title of District Court and Cause.]

ADJUDICATION IN BANKRUPTCY

The petition of Orban Lumber Company, a corporation; E. A. Lynch, Trustee in Bankruptcy for the Estate of Percy F. Bennett, dba Bennett Roofing Company, and Frank M. Chichester, Trustee in Bankruptcy for the Estate of Charles H. Abel, having been filed herein on July 10, 1953, that Kenneth P. Schmidt Builders, Inc., be adjudged a bankrupt under the Act of Congress relating to bankruptcy; and, thereafter, a petition under Section 321 of Chapter XI of the Bankruptcy Act having been filed herein; and on December 7, 1953, an order having been entered dismissing the said petition under Chapter XI and directing that the involuntary proceedings in bankruptcy be proceeded with; and the last day for filing an answer to the hereinbefore-set-forth petition of involuntary bankruptcy being November 30, 1953; and it appearing to the Court that service of the said involuntary petition and amendments thereof has been had upon the alleged bankrupt in the manner prescribed by law; and it further appearing that the said alleged bankrupt has not answered, or otherwise appeared to defend the said petition for involuntary bankruptcy but has defaulted therein; and the Referee being otherwise fully advised in the premises, [8]

It Is Ordered that Kenneth P. Schmidt Builders, Inc., be and it hereby is adjudged to be a bankrupt

under the Acts of Congress relating to bankruptcy.

Dated: December 7, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed December 7, 1953. Referee.

[Endorsed]: Filed December 8, 1953. U.S.D.C.

[Title of District Court and Cause.]

PETITION IN SUPPORT OF ORDER TO
SHOW CAUSE

To the Honorable Judge of the Above-Entitled
Court:

Comes now Charles M. Fueller, on behalf of
Clarence E. Polikowsky and Winnifred Polikow-
sky, and respectfully represents as follows:

That said Charles M. Fueller is an attorney at
law and during the months of October and Novem-
ber, 1952, acted as attorney for said Clarence E.
Polikowsky and Winnifred Polikowsky in connec-
tion with the negotiations for the sale by said
Clarence E. Polikowsky and Winnifred Polikow-
sky to Kenneth P. Schmidt, Mary Wilkins Schmidt
and Kenneth P. Schmidt Builders, Inc., a Cali-
fornia corporation, of the real property hereinafter
described, and is familiar with the facts and cir-
cumstances of said negotiations.

That as a result of said negotiations, on or about

February 10, 1953, the said Clarence E. Polikowsky and Winnifred Polikowsky sold and transferred the hereinafter described real property to Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt [10] Builders, Inc., purchasers, and at their request made, executed and delivered to said purchaser their certain grant deed conveying the hereinafter described real property, and the grantee therein named was Kenneth P. Schmidt Builders, Inc.

That in consideration thereof and the only consideration therefor was the execution and delivery by the said purchasers, Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., was their certain promissory note in words and figures as follows, to wit:

\$20,000.00

December 5, 1952.

On or before 190 days after date, without grace, the undersigned promise to pay to the order of Clarence E. Polikowsky and Winnifred Polikowsky, his wife, as joint tenants at Pasadena, California, Twenty Thousand and no/100 Dollars in lawful money of the United States of America, with interest thereon, in like lawful money, at the rate of six per cent per annum from date until paid for value received. Interest to be paid at maturity and if not so paid, the whole sum of both Principal and Interest to become immediately due and payable, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, undersigned

promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

[Seal] KENNETH P. SCHMIDT
BUILDERS, INC.,

By /s/ KENNETH P. SCHMIDT,
Pres.;

By /s/ MARY W. SCHMIDT,

/s/ MARY W. SCHMIDT,

/s/ KENNETH P. SCHMIDT.

Due December 5, 1952. [11]

which said promissory note was unsecured by deed of trust, mortgage or otherwise.

That no payments have been received on account of said promissory note and the same is wholly due, owing and unpaid.

That the said purchasers, Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have not sold, transferred nor encumbered said real property, hereinafter described, to any purchaser or mortgagee for value without notice or otherwise, and as a result of said transaction the said Clarence E. Polikowsky and Winnifred Polikowsky are entitled to a vendor's lien upon said real property, hereinafter described, for the amount of said purchase price, to wit: \$20,000.00; and are entitled to have the same impressed upon said real property, said vendor's lien arising

by virtue of the provisions of Section 3046 of the Civil Code of the State of California.

That said real property is described as follows, to wit:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc [12] concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

Wherefore, your petitioner, on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, respectfully requests the above-entitled Court that an

Order to Show Cause be issued direct to said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., and to Frank M. Chichester, Trustee in Bankruptcy for said Kenneth P. Schmidt Builders, Inc., directing them to show cause, if any they have, why said vendor's lien should not be impressed upon said real property and why the above-entitled Court should not declare that they, the said Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have no right, title nor interest therein or why said Clarence E. Polikowsky and Winnifred Polikowsky should not be permitted to bring an action in the courts of the State of California to impose said vendor's lien.

That said Charles M. Fueller, as attorney, makes this petition on behalf of said Clarence E. Polikowsky and Winnifred Polikowsky for the reason that said persons are absent from the County of Los Angeles.

Dated: This 22nd day of October, 1953.

/s/ CHARLES M. FUELLER,
Petitioner.

Duly verified.

[Endorsed]: Filed October 26, 1953, [13]
Referee.

[Title of District Court and Cause.]

ANSWER TO PETITION FOR
ORDER TO SHOW CAUSE

To the Honorable Reuben G. Hunt, Referee in
Bankruptcy:

Comes now Frank M. Chichester, and on behalf
of himself as Receiver and for no other person,
makes the following answer to order to show cause:

I.

The order to show cause of Clarence E. Polikowsky and Winnifred Polikowsky denies generally and specifically that on or about February 10, 1953, or any other time, or at all, petitioners Clarence E. Polikowsky and Winnifred Polikowsky, or either of them, sold or transferred any real property whatsoever, or at all to Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., or the said Kenneth P. Schmidt, Mary Wilkins Schmidt or Kenneth P. Schmidt Builders, Inc., requested the execution or delivery of a grant deed on any real property whatsoever, or at all, in the name of Kenneth P. Schmidt Builders, Inc. Respondent Chichester admits, however, that on or about February 10, 1953, Kenneth P. Schmidt Builders, Inc., and Clarence E. Polikowsky and Winnifred Polikowsky entered into an agreement whereby the said Polikowskys transferred certain real property, [15] more particularly described as follows:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of Cali-

fornia, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

To Kenneth P. Schmidt Builders, Inc., and that the said Polikowskys executed a grant deed at the instance of Kenneth P. Schmidt Builders, Inc., of the hereinbefore-described real property in favor of Kenneth P. Schmidt Builders, Inc.

II.

Respondent Chichester admits that on or about December 5, 1952, a promissory note in the sum of \$20,000.00, as set forth in the petition for order to show cause herein, was executed and [16] delivered

to Clarence E. Polikowsky and Winnifred Polikowsky as consideration for the purchase price of the hereinbefore-described real property and that the same was the only consideration for the said property; that the said promissory note is unpaid and the same is wholly due and owing.

III.

Respondent Chichester denies both generally and specifically that Kenneth P. Schmidt, Mary Wilkins Schmidt and Kenneth P. Schmidt Builders, Inc., have not sold, transferred nor encumbered the property hereinbefore described or embraced in the petition for order to show cause herein. Respondent Chichester admits that the said property has not been sold nor encumbered by the grantee, Kenneth P. Schmidt Builders, Inc.

IV.

Respondent Chichester denies that Clarence E. Polikowsky or Winnifred Polikowsky, either severally or collectively, have any vendor's lien on the property hereinbefore described for the amount of \$20,000.00, or for any other sum, or at all, by virtue of Section 3046 of the Civil Code of the State of California, or any other statutory provision, or in any other fashion, or at all.

Wherefore, respondent prays that the petitioners herein take nothing by virtue of their order to show cause and that the court issue an order denying a vendor's lien, or any other sort of lien whatsoever in favor of Clarence E. Polikowsky and/or Winnifred Polikowsky on the hereinbefore-de-

scribed real property, or any other assets of this debtor estate.

Dated: November 9, 1953.

/s/ FRANK M. CHICHESTER,
Receiver in Bankruptcy.

Duly verified.

[Endorsed]: Filed November 10, 1953, [17]
Referee.

[Title of District Court and Cause.]

ANSWER OF KENNETH P. SCHMIDT BUILD-
ERS, INC.; KENNETH P. SCHMIDT AND
MARY WILKINS SCHMIDT

Now come Kenneth P. Schmidt Builders, Inc., a corporation; Kenneth P. Schmidt and Mary Wilkins Schmidt (hereinafter designated as "Respondents") and answering the petition heretofore filed herein by Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, deny and allege as follows:

I.

Deny generally and specifically each and every allegation set forth therein except the allegation that they executed and delivered the promissory note described therein, which allegation is admitted to the extent and subject to the limitations hereinafter set forth; and except the allegations that said note is unsecured by deed of trust or mortgage, that no payments have been made thereon and that Charles M. Fueller is an attorney at law and rep-

resents said clients, which allegations are admitted.

II.

Further answering said petition, said respondents state that Kenneth P. Schmidt Builders, Inc., is a corporation that was engaged at all times stated in said petition in the business of buying lands; [19] the placing of construction loans thereon and the building of homes thereon for the purpose of sale by it to the general public, and that on or about December 5, 1952, it stated to said Clarence E. Polikowsky and the said Winnifred Polikowsky that it offered to purchase the lands described in said petition if same could be delivered to it free and clear of all encumbrances, including purchase price encumbrances; as it intended to borrow a large sum of money from a financial institution for the purpose of building ten (10) or more houses on said land and would be required by such financial institution to give it a first lien upon said property, and that it would pay for said lands by delivering its promissory note payable to them in the sum of \$20,000.00, and that it would pay said note at maturity either from borrowed sums of money or from monies received from the sale of said ten or more houses.

III.

That on or about December 5, 1952, the said Clarence E. Polikowsky and the said Winnifred Polikowsky stated to said Kenneth P. Schmidt Builders, Inc., that its offer was accepted provided that its unsecured promissory note, in the sum of

\$20,000.00, was executed also by Kenneth P. Schmidt and by his wife, the said Mary Wilkins Schmidt.

IV.

That thereafter, and on or about February 10, 1953, the promissory note described in said petition having been previously executed by all of said persons, it was delivered by said corporation to the said Clarence E. Polikowsky and the said Winnifred Polikowsky in exchange for the deed to the lands described in said petition, which deed, conveying said lands to Kenneth P. Schmidt Builders, Inc., was delivered by them to it on or about said day.

V.

That the said Clarence E. Polikowsky and the said Winnifred Polikowsky are not, and no one of them is, entitled to have a vendor's [20] lien, or any other lien, impressed upon said real property by virtue of Section 3046 of the Civil Code of California, or in any manner, or at all, and they have no right, title nor interest therein.

Wherefore, said respondents pray that petitioners be denied all relief prayed for in said petition; that said petition be dismissed, and for costs.

Dated: November 10, 1953.

/s/ L. M. CAHILL,

Attorney for Respondents.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 12, 1953, [21]
Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE WAIVER
OF VENDOR'S LIEN

Petition of Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky to have a vendor's lien declared on certain real property of the estate located in Pasadena, Los Angeles County.

BLANCHE & FUELLER,
Attorneys for Petitioners.

CRAIG, WELLER & LAUGHARN,
Attorneys for Receiver.

LAWRENCE M. CAHILL,
Attorney for Kenneth P. Schmidt Builders, Inc.; Kenneth P. Schmidt and Mary Wilkins Schmidt.

I.

Statement of the Case

The above-entitled case is an involuntary bankruptcy proceeding commenced on July 10, 1953. On the same date Frank M. Chichester was appointed and qualified as Receiver in Bankruptcy. An adjudication in bankruptcy was entered on Dec. 7, 1953. In the previous Chapter XI proceedings, which failed, Frank M. Chichester was nominated as Trustee in Bankruptcy, and on December 9, 1953, he was appointed [23] and qualified as Trustee in Bankruptcy.

On October 26, 1953, Charles M. Fueller on behalf

of Clarence E. Polikowsky and Winnifred Polikowsky, filed a petition for the fixing of a vendor's lien upon certain real property of the bankrupt corporation located in Pasadena, Los Angeles County. Thereafter and on November 10, 1953, the said Frank M. Chichester, as such Receiver, filed an answer to the said petition opposing the allowance of such vendor's lien. On November 12, 1953, Kenneth P. Schmidt Builders, Inc., Kenneth P. Schmidt and Mary Wilkins Schmidt filed a similar answer to the said petition.

Hearings upon the issues raised by the said pleadings were held before the undersigned Referee in Bankruptcy on November 12, 19 and 25, 1953. The controversy was then submitted to the Referee for decision on briefs. The reporter's transcript of the hearing on November 19, 1953, was filed February 12, 1954, that of the hearing on November 25, 1953, on January 13, 1954, and that of the hearing on March 4, 1954, on March 9, 1954.

At the hearings of November 25, 1953, counsel for the respondents attempted to introduce parol evidence to add to the intention of the parties as disclosed by their contracts (original and amended escrow instructions). But the Referee refused to permit the introduction of such evidence upon the ground that the contracts were clear and explicit and there was no ambiguity or uncertainty with respect to them or any of their terms. In this the Referee was in error. The California law appears settled as follows:

In the interpretation of contracts the duty of the

court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation [24] (Civ. Code, Secs. 1638, 1639), nevertheless the meaning is to be obtained from the entire contract and not from any one or more isolated portions thereof. *Hunt v. United Bank & Trust Co.*, 210 C. 108, 115, 291 P. 184; *Kennedy v. Lee*, 147 C. 596, 601, 82 P. 257; *Eastman v. Piper*, 68 C.A. 554, 229 P. 1002; 13 C.J. 525. To assist in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted (Civ. Code, Sec. 1647; *Ogburn v. Traveller's Ins.*, 207 C. 50, 53, 276 Pac. 1004; *Smith v. Carlston*, 205 C. 541, 550, 271 P. 1091; *Henika v. Lange*, 55 C.A. 336, 339, 203 P. 798), including the object, nature and subject matter of the agreement (6 R.C.L., pp. 836, 837; *Eastman v. Piper*, 68 C.A. 554, 229 P. 1002; *Canal v. Hill*, 82 U.S. 94, 100, 101, 21 L. Ed. 64), and the preliminary negotiations between the parties (6 R.C.L. p. 839), and thus place itself in the same situation in which the parties found themselves at the time of contracting. Code Civ. Proc., Sec. 1860; 6 R.C.L., p. 849; *Jersey Island Dredging v. Whitney*, 149 C. 269, 273, 86 P. 509, 691; *Blaeholder v. Guthrie*, 17 C.A. 297, 300, 119, P. 524; *Lemm v. Stillwater Land & Cattle*, 217 C. 474, 480, 19 P. (2) 785; *Patterson-Ballagh v. Byron Jackson*, C.C.A. 9, 145 F. (2) 786; *Broome v. Broome*, 104 C.A. (2) 148, 231 P. (2) 171; *Berdan v. Berdan*, 39 C.A. (2) 482, 103 P. (2) 622; *Rhinehart v. So. Pac.*, SD Cal., 38 F.S. 79. In the case of *Lindsay v. Mack*, 5 C.A. (2) 491,

43 P. (2) 650, the court said: "The second exception to the parol evidence rule applicable here is clearly stated in *Greathouse v. Daleno*, 57 Cal. App. 187 (206 Pac. 1019) where it is said: 'A well-understood concurrent rule is, that where the parol evidence which is offered is entirely consistent with and in no way changes or contradicts the written instrument, such parol evidence may be admitted. (*Harrison v. McCormick*, 89 Cal. 327, 330, 23 Am. St. Rep. 469, 26 P. 830); [25] *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95, 73 P. 730.' " So, on February 23, 1954, the Referee of his own motion, reopened the matter to give both sides an opportunity to present any parol or other evidence that would be consistent with the rulings of these cited cases. Accordingly, a further hearing was held on March 4, 1954, and the matter was again submitted to the Referee for decision.

In their briefs, counsel for the petitioners contend that Kenneth P. Schmidt was the alter ego of the corporation, and that, therefore, he became an owner of the property as well as the corporation and that the property was acquired by him as community property and, therefore, the wife had a community interest therein, thus negating the effect of the third parties' signatures to the note of the husband and wife.

II.

Statement of the Evidence

The facts do not appear to be in dispute.

The bankrupt was a California corporation en-

gaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned or controlled practically all of the capital stock of the corporation, and was its president. Mary Wilkins Schmidt is the wife of Kenneth P. Schmidt.

Prior to October 30, 1952, the Polikowskys listed the said real property for sale with H. T. MacArthur, a real estate broker. MacArthur's employee, William Duncan, contacted Kenneth P. Schmidt for the sale of the property. The latter never met or dealt with the Polikowskys. The said broker conducted on their behalf all negotiations for the sale of the property. The original escrow instructions, as first drawn, provided for completion bonds for the houses to [26] be built upon the tract by the bankrupt corporation, as well as bonds to guarantee the completion of the street and utility improvements upon the property. It developed that the bankrupt corporation was unable to furnish such completion bonds; and so the original escrow instructions were signed and delivered on October 30, 1952, by the parties with this completion bond provision deleted.

These original escrow instructions were delivered to Mutual Savings and Loan Association of Pasadena for the sale by Clarence E. Polikowsky and Winnifred Polikowsky to the bankrupt corporation of said real property for the purchase price of \$20,000.00. They provided that the Title Insurance and Trust Company of Los Angeles should issue a policy of title insurance showing title vested in the

bankrupt corporation free of encumbrances, except certain specified taxes and special district levies. This policy expressly stated that it did not cover liens which were not shown by the public records. The vendor's lien asserted here was not, of course, on the public records; a vendor's lien is created by law and not by the parties. The original escrow instructions also provided that a note for the purchase price and a deed of trust to secure its payment were to be executed and delivered to the sellers by the bankrupt corporation and Kenneth P. Schmidt personally, and that this trust deed would be subordinated to the lien of certain construction loans to be incurred by the buyer in making improvements on the property. Kenneth P. Schmidt, after the original escrow instructions were signed, contacted Mr. MacArthur and requested him to contact the Polikowskys for the purpose of amending the original escrow instructions by deleting the provision for the subordinated deed of trust so that the bankrupt corporation would get clear title to the property. In return for this Kenneth P. [27] Schmidt and his wife, Mary Wilkins Schmidt, would personally execute the note for the purchase price.

It appeared that the deal had to be handled this way or be cancelled. Later Mr. MacArthur notified Kenneth P. Schmidt that this request was acceptable to the Polikowskys. So the amended instructions of December 5, 1952, were prepared and signed. These eliminated the deed of trust provision in favor of the Polikowskys and provided that the

purchase money note should be signed individually by Kenneth P. Schmidt and Mary Wilkins Schmidt.

Pursuant to the original and amended escrow instructions, a promissory note for \$20,000.00 was executed and delivered to the petitioners by the corporation, and by Kenneth P. Schmidt and Mary Wilkins Schmidt, as co-signers; and the sellers executed and delivered a deed to the property vesting the title in the bankrupt corporation. This deed recited that the property is subject only to covenants, conditions, restrictions, reservations, rights-of-way and easements now of record, if any.

The note is wholly unpaid and title to the property is now vested in the said trustee in bankruptcy by operation of law.

The sellers knew that the bankrupt corporation was purchasing the property for the purpose of erecting homes thereon to be sold to the public; and that the corporation proposed to operate by placing construction loans on the property. This is evidenced by the original escrow instructions themselves which directly refer to such kind of loans, and which were not amended in this particular.

III.

Questions Presented

1. Were Polikowskys chargeable with the knowledge acquired [28] throughout the transaction by their agent, H. T. MacArthur?

2. Was the normal vendor's lien of the sellers under Sec. 3046 of the California Civil Code waived

by them accepting a note signed not only by the bankrupt corporation, the vendee, but also by two third parties who thereby as original makers of the note became severally bound to pay the same?

3. Was such vendor's lien waived by the provision in the escrow instructions that the title should be vested in the purchaser free of encumbrances, except taxes and special district levies; and also by the provision of the deed delivered to the bankrupt corporation which provided that the property was to be subject to certain matters without mentioning vendor's lien?

4. Is the corporation alter ego theory applicable here because Kenneth P. Schmidt owned or controlled all of the capital stock of the corporation?

5. Were Kenneth P. Schmidt and Mary Wilkins Schmidt joint purchasers of the property with the bankrupt?

IV.

Comment on the Law

1. The Seller Petitioners Were Chargeable With All the Information Acquired During the Transaction by Their Agent, H. T. MacArthur.

This proposition is fully supported by the authorities cited in Cal. Jur. (2) Vol. 2, p. 855.

2. The Sellers Waived the Vendor's Lien by Accepting a Note for the Purchase Price Signed Not Only by the Vendee Bankrupt Corporation, but Also by Two Third Parties.

It is not essential to the right to claim a vendor's

lien that an intention on the part of the vendor to create and retain unto himself the right to such lien should be expressly [29] declared. The right is given in equity and in law by the very nature of the transaction and consequently exists without regard to the express agreement of the parties. *Ferger v. Allen*, 35 C.A. 738, 170 P. 861.

A vendor's lien, however, may be waived by acts and conduct inconsistent with a continuing claim therefor. *Estate of Reed v. Reed*, 26 C.A. (2) 362, 79 P. (2) 451. When the lien is once waived it is gone forever. *Royal Consolidated Mining v. Royal Consolidated Mines*, 157 C. 737, 110 P. 123. In the case of *Finnell v. Finnell*, 156 C. 589, 595, 105 P. 740, the court said: "The question in this connection is not what were the secret thoughts or expectations of plaintiff as to whether he was to get this purchase money, but whether he had done any act or made any statement that manifested his intention to abandon any right given him by law to enforce his claim against the land, and to look solely to his father personally for payment, in other words, had he done or said anything that was inconsistent with the retention of a lien and amounted to a waiver thereof. As was said in *Moshier v. Meek*, 80 Ill. 79, speaking of such a lien, 'this lien, in equity, is created without the express agreement of the parties, and even when they do not know that such a lien exists or is created by operation of law.' " In *Houston v. Dickson*, 66 Tex. 79, 1 S.W. 375, the court, after saying that the lien may be waived by such facts as show that the vendor relies on other

security, or relinquishes his right to the security which the law gives him, said: "But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right."

In the case of *Jones v. Allert*, 161 C. 234, 118 F. 794, it was held that a vendor waives his lien upon real property by receiving a promissory note executed by third persons as security [30] for the balance of the purchase price due from the vendee. This principle of law prevails in other states. *Special Tax School Dist. v. Hellman*, 179 So. 805, 131 Fla. 725; *Rubendall v. Talla*, 119 P. (2) 851, 190 Okla. 24; *Czelusnik v. Watroba*, 186 Ill. App 201; *Goldinger Realty v. Stehr*, 198 NYS 905, 207 App. Div. 832; *Bennett v. Murphy*, 108 NYS 231, 123 App. Div. 102, *aff'd*. 88 NW 1114, 195 N.Y. 553; *Jode v. Chedister*, 73 Tenn. (5 Lea) 346.

3. The Sellers Also Waived Their Lien by Agreeing That the Title Should Be Transferred Free of Encumbrances, Except Taxes and District Levies; and by Their Deed Which Made Reservations Without Mentioning a Vendor's Lien.

In the case of *Edison Securities v. Ventura Guarantee Building and Loan Association*, 10 C.A. (2) 555, 55 P. (2) 608 (rehearing denied by the Supreme Court), the vendor agreed to sell certain land to the vendee for the sum of \$45,000.00, payable \$5,000.00 upon the execution of the agreement, \$20,000.00 evidenced by the note of the vendee secured by a mortgage or deed of trust upon the land, and the remaining \$20,000.00 by the delivery

to the vendor of \$20,000.00 of certain investment certificates. Thereupon the vendor executed and delivered to the vendee a deed to the land. The \$5,000.00 cash was paid, the note and a deed of trust were executed and delivered together with the investment certificates. Thereupon, the vendor executed and delivered to the vendee a deed to the land. The note secured by the deed of trust was paid. \$15,000.00 of the investment certificates were redeemed. The vendor sued to recover the \$5,000.00 balance and asserted the right to a vendor's lien upon the land. The agreement of purchase provided that the escrow holder, a title company, should issue a guaranty of title, with a liability of \$45,000.00 showing title to be vested in the vendee, subject only to the said deed of trust, and, otherwise, to be free of all incumbrances [31] and rights, except as therein mentioned, there being no reservation therein of a vendor's lien. The court further held that the covenant that the vendee's title to the land should be free and clear of incumbrances except the deed of trust specified excluded the idea of the retention of a vendor's lien.

The Referee has examined the Clerk's transcript in that case. It contains a copy of the purchase agreement; and such agreement is similar to the one in the case here. In our case here the covenant is that the policy of title insurance shall show title vested in the bankrupt corporation, free and clear of all incumbrances except taxes and district levies. Counsel for the petitioners insist that since the title policy here expressly excludes liens not of

record, such as a vendor's lien, the clause "free of incumbrances" does not exclude an unrecorded vendor's lien. The purchase agreement here is not subject to any such construction any more than it was in the Edison Securities case. An intention to abandon a vendor's lien is manifested by the taking of a mortgage or trust deed for the purchase money. *Hunt v. Waterman*, 12 C. 301; *Wells v. Harter*, 56 C. 342, superseding 2 C.U. 52; *Lee v. Murphy*, 119 C. 364, 51 P. 549, 955. In our case here the original escrow instructions provided for the vendee, the bankrupt corporation, to give a subordinate deed of trust to secure the payment of the purchase price. The amended instructions dropped the deed of trust and substituted in its place the personal guarantee of the bankrupt's wife, Mary Wilkins Schmidt. There is nothing in these amended instructions to evince an intent to revive the vendor's lien so clearly excluded by the original instructions. While the mere execution and delivery by the vendor of a warranty deed, standing alone, would not prove [32] a waiver of the vendor's lien for the unpaid purchase price (*Couser v. Wilmoth*, Mo. App. 142 S.W. (2) 777), the deed in our case here expressly makes reservations as to certain matters of record, but no reservation or mention is made of any vendor's lien.

4. The Domination and Control of the Bankrupt Corporation by Kenneth P. Schmidt, Its Principal Stockholder, Did Not Make Him Its Alter Ego Under the Circumstances.

Counsel for the petitioners contend that by rea-

son of his stock control Kenneth P. Schmidt was practically the owner of the corporation and, therefore, the corporate veil should be pierced so that Kenneth P. Schmidt and the bankrupt corporation may be considered to be one with respect to the title to the property. Even though this be so, we still have to consider the effect of the signature of Mary Wilkins Schmidt to the note. If the real owner could be held to be Kenneth P. Schmidt, himself, then it might be said that Mary Wilkins Schmidt had a community interest therein since the property was acquired during their marriage. Counsel for petitioners rely upon the case of *Smith v. Schultz*, 23 Ida. 144, 129 P. 640, where the Court held that, if the property involved was community property, the wife's signature would not constitute security, but would be merely evidence of the community indebtedness or the signature of one of the purchasers. Counsel's theory is that the corporation and Schmidt were one, both were the purchasers, and the property acquired became the community property of Schmidt and his wife. This theory is untenable since in our case here there is no evidence that the purchaser was other than the bankrupt corporation.

Counsel overlooks the fact that the corporate veil will be pierced only to prevent inequity, fraud or injustice. In *Clark v. Millsap*, 197 Cal. 765, 242 P. 198, it was held that [33] it is a well recognized rule of law that a corporation will be considered a separate legal entity when used for the accomplishment of a legal purpose, but cannot be used as a

cover under which wrongs may be committed and fraud perpetrated. In such a case the Court will look through the form of the corporation to ascertain its actual purpose and intent. If the purpose and intent of the corporation is fraud or inequity, the corporate entity will not be a cover for wrongs, fraud and bad faith. In other words, proof that an individual owns all of the stock of a corporation and that the corporation is in truth and fact but the corporate double of the owner of the stock, will, in conjunction with the further showing that as a result of the double relationship, inequity or fraud, or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. *Minifie v. Rowley*, 187 C. 481, 202 P. 672; *Wenban Estate v. Hewlett*, 193 C. 675, 227 P. 723; *Gordon v. Aztec Brewing*, 33 C. (2) 514, 213 P. (2) 522; *Groether v. Meyer Rosenberg*, 11 C.A. (2) 268, 53 P. (2) 966. Where the alter ego theory is successfully invoked the individual is held to the same rules of accountability as the corporation, with respect to its acts and obligations. Petitioners here could have no further remedy than the one they have, even if the corporate veil were pierced. With Kenneth P. Schmidt's signature on the note he can personally be held liable for the corporation's obligations. Without such signature the case of *Goldberg v. Engleberg*, 34 C.A. (2) 10, 92 P. (2) 935, cited by petitioners might be in point.

The piercing of the corporate veil, therefore, would be an idle act and the law neither does nor requires an idle act. Cal. Civ. Code Sec. 3532. See

also *Asamen v. Thompson*, 55 C.A. (2) 661, 131 P. (2) 841; *Whitman v. Whittingham*, [34] 85 C.A. 140, 259 P. 63; *Minifie v. Rowley*, 187 C. 481, 202 P. 672; *Grother v. Rosenberg*, 11 C.A. (2) 268, 53 P. (2) 996.

Also the situation here is that no evidence has been presented to show that inequity, fraud or injustice would result from treating the bankrupt corporation as a separate legal entity from that of Kenneth P. Schmidt who owned or controlled its capital stock. By way of analogy, see *Wheeler v. Smith*, CCA 9, 13 ABR (NS) 253, 30 F. (2) 59, and *Finn v. Mickle*, CCA 9, 16 ABR (NS) 412, 41 F. (2) 676, where it was held that a claim against a bankrupt estate cannot be rejected merely because the claimant owned all of the capital stock of the bankrupt corporation. Counsel for the Polikowskys contend that an inequitable result so far as they are concerned would result if they cannot have a vendor's lien. But such a result here would be no different than in many other cases in bankruptcy where creditors recover little or nothing through their previous failure to take adequate and legal security in extending credit, when they had the opportunity to do so as these petitioners did here. The truth of the matter is that the Polikowskys would have been unable to sell the property to the bankrupt corporation if they had insisted upon a mortgage, or deed of trust, or other lien, to secure the purchase price. The bankrupt corporation could not have secured the necessary construction loans to build the contemplated houses on the land sold

if such security had been given, or if a vendor's lien existed unwaived. Furthermore, there is no evidence here to show that the Polikowskys may not eventually secure full recovery by recourse to the personal assets of Kenneth P. Schmidt and his wife, Mary Wilkins Schmidt, both of whom signed the purchase money note. Also, even though Kenneth P. Schmidt and his wife fail to pay the note when called upon to do so, the [35] final worthlessness of such security cannot militate against the fact that the acceptance and receipt of it by the vendors here worked a waiver of their vendor's lien. *Carter v. Garetson*, 56 C.A. 238, 204 P. 1090.

5. The Bankrupt Corporation Was the Sole Purchaser of the Property.

The sellers contend that the purchasers of the property were not only the bankrupt, but also Kenneth P. Schmidt and Mary Wilkins Schmidt. This argument is without merit. The sole purchaser designated in the escrow instructions is the bankrupt. The sole grantee in the deed is the bankrupt. The only relation of Kenneth P. Schmidt and Mary Wilkins Schmidt to the transaction was as co-makers of the note to give the sellers additional protection beyond the promise of the bankrupt. Their signatures were in the nature of a guarantee that the bankrupt corporation would fulfill its obligation.

V.

Conclusion

An intent to abandon a vendor's lien is not to be

presumed; the evidence of an intent to abandon or waive it should be clear and satisfactory. A vendor's lien may be defeated if the vendor does any act manifesting an intention not to rely on the land as security. *Slide and Spur Gold Mines v. Seymour*, 153 U.S. 509, 38 L. Ed. 802. This test is met here. The sellers manifested their intention to waive their vendor's lien by (1) the terms of the escrow agreement which required a title free of all encumbrances, except taxes, and the terms of the deed; and (2) the requiring of the security of the individual signatures on the purchase money note of Kenneth P. Schmidt and Mary Wilkins Schmidt.

The sellers, the Polikowskys, could have taken absolute security for the payment of the purchase price by way of a [36] first mortgage or trust deed. Instead they relied not only upon the bankrupt's obligation, but also upon the security given by the individuals, Kenneth P. Schmidt and Mary Wilkins Schmidt, who signed the note. It is significant that in the original escrow instructions the sellers were willing to take a deed of trust to secure the obligation which would be subordinate to construction loans, and that the amended instructions deleted this provision and required the personal signature to the note of not only Kenneth P. Schmidt, but also his wife, Mary Wilkins Schmidt. It seems apparent that if the sellers had required a mortgage or trust deed, or had not waived their vendor's lien and insisted upon it, there would not have been any sale because the bankrupt could not have operated with the land tied up in that way.

That we have correctly interpreted the intent of the parties in connection with their written instruments is clearly shown from the parol evidence received concerning their preliminary negotiations.

It follows, therefore, that the petition must be denied.

Counsel for the Trustee will prepare, serve and file appropriate findings of fact, conclusions of law and order pursuant to General Rule No. 7 of this Court.

This particular proceeding is being prosecuted by Attorney Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky, the real parties in interest. Federal Rule of Civil Procedure No. 17a provides that every action shall be prosecuted in the name of the real party in interest. This is similar to Cal. Code Civ. Proc. Sec. 367. It was held in the case of *Babcock v. Mississippi River Power CCA* 7, 113 F. (2) 398, that "an action can be brought only by one having a real and actual interest in the subject matter, [37] and it is not enough for plaintiff to show a cause of action in some one else, and plaintiff must show that he personally has an enforceable right." It is obvious that the petitioners are appearing here improperly. Their attorney is not the real party in interest and has no real or actual interest in the subject matter of this litigation; he does not hold any enforceable right. The Referee has been informed that the trustee's counsel is willing to stipulate with counsel for the Polikowskys to the end that they be substituted as the parties here, so that this litigation will not be unduly delayed by the initiation of a

new proceeding for the same purpose with the Polikowskys as the petitioners. With this done, the order to be prepared pursuant to this opinion can reflect the changed situation.

Dated: March 25, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed March 25, 1954, Referee. [38]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PETITION IN
RECLAMATION OF CLARENCE E. AND
WINNIFRED POLIKOWSKY

This matter came on for hearing on the verified petition of Charles M. Fueller, filed on behalf of Clarence E. and Winifred Polikowsky, to fix a vendor's lien on certain real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, on November 12, November 19 and November 25, 1953, and the proceedings were then submitted to the Referee; that on February 23, 1954, this matter having been reopened by the undersigned Referee on his own motion for the taking of further testimony, and the trustee having appeared by and been represented through his counsel, Crag, Weller & Laugharn by

C. E. H. McDonnell, at all hearings, and the respondents Kenneth P. Schmidt and Mary Wilkins Schmidt having appeared by and been represented through their counsel, Lawrence M. Cahill, and the petitioners Clarence E. and Winnifred Polikowsky having appeared by and been represented through their counsel, Blanche and Fueller by Charles M. Fueller; and evidence both oral and documentary having been offered and [39] received, and the respondents hereto having stipulated in writing that the pleadings filed and signed herein by Charles M. Fueller on behalf of Clarence E. Polikowsky and Winnifred Polikowsky could be considered as filed and signed by the said individuals; and the Referee having taken the matter under submission on March 4, 1954, and being fully advised in the premises does now make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

The Court finds as true that at all times mentioned herein Kenneth P. Schmidt and Mary Wilkins Schmidt were and now are husband and wife; that the bankrupt was a California corporation engaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned and controlled practically all of the capital stock of the bankrupt corporation and was its president and one of its directors. He dominated and controlled the corporation. These facts

were known to the Polikowskys, the respondents and real parties of interest herein.

II.

Prior to October 30, 1952, Kenneth P. Schmidt negotiated with the Polikowskys, through their agent, for the sale of the real estate herein involved by the Polikowskys to the bankrupt corporation. Originally, the bankrupt corporation agreed to supply completion bonds upon houses to be erected upon the said real property and to guarantee the street and utility improvements to be made therein by the bankrupt corporation, but the bankrupt corporation was unable to secure the said bonds so the sale proceeded with this portion of the agreement deleted.

III.

On October 30, 1952, an escrow was opened between the [40] Polikowskys, as sellers of the said real property, and the bankrupt as the buyer of the same, at the Mutual Savings and Loan Association of Pasadena (hereinafter referred to as "escrow holder") to accomplish the transfer of the said real property. On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth the purchase agreement in writing as follows: The bankrupt corporation was to give its promissory note to the sellers in the sum of \$20,000.00, the said note also to be signed by the bankrupt corporation and Kenneth P. Schmidt, personally, and to be secured

by a second deed of trust on the said real property and the said second deed of trust to be subordinated to a trust deed later to be given by the bankrupt corporation and said real property to secure construction loans for the houses projected on the said real property. The sellers were also to furnish a title insurance policy showing title vested in the bankrupt corporation free of encumbrances except specified taxes and special levies. The said title policy was so furnished and provided. The said policy also stated that it did not cover liens which are not shown by the public record.

IV.

After October 20, 1953, it appearing that the transaction could not be completed upon the basis above mentioned, the Polikowskys and the bankrupt corporation amended on December 5, 1952, the said escrow instructions by deleting therefrom all mention of the second deed of trust to have been given to the Polikowskys as above stated and to substitute therefor the individual security of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt along with that of the corporation on the said promissory note for \$20,000.00. These amended instructions were signed by the Polikowskys and the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually. [41] Pursuant to the said amended escrow instructions, a promissory note in the sum of \$20,000.00 was executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, in-

dividually, as co-signors and delivered into said escrow; and the sellers executed and delivered into said escrow a deed vesting title to the said real property in the bankrupt corporation, subject only to covenants, conditions, restrictions, reservations, rights of way and easements of record if any in the bankrupt corporation. Thereupon, the said escrow was closed, the said deed was delivered to the bankrupt corporation, and the said promissory note was delivered to the Polikowskys thus completing the transaction.

V.

Neither the whole nor any part of the said promissory note has ever been paid.

VI.

At none of the times herein mentioned was the bankrupt corporation used or intended to be used by the said Kenneth P. Schmidt as his alter ego or as a device to perpetrate any fraud, injustice or inequity.

Conclusions of Law

I.

The purchaser of the real property involved herein is Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property.

II.

That the bankrupt corporation is not the alter ego of Kenneth P. Schmidt, individually, and is a separate entity distinct from Kenneth P. Schmidt, even though he owned or controlled [42] practically all of the capital stock of the corporation and controlled and dominated its affairs.

III.

The vendor's lien asserted by the Polikowskys herein has been waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the promissory note given as consideration for the transfer of the said real property.

IV.

The vendor's lien asserted herein by the Polikowskys has been waived by agreeing the title to the real property should be transferred free of encumbrances, taxes and district levies and by deed transferring title subject to reservations but not including a reservation of a vendor's lien.

V.

The vendor's lien asserted herein by the Polikowskys was waived by knowingly transferring title to the bankrupt corporation without encumbrance of record so that the said bankrupt corporation might use the said real property as the subject of other encumbrances to secure loans for the pur-

poses of construction on the said real property.

Now, Therefore,

It Is Ordered that the petition of Clarence E. Polikowsky and Winnifred Polikowsky in reclamation in the within proceedings be and the same hereby is disallowed, and it be and it hereby is fixed and determined that the following described real property is the property of this bankrupt estate free and clear of any claim in or to the said property on the part of or on behalf of the said Clarence E. Polikowsky and Winifred Polikowsky:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of [43] California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly

boundary line of said Lot 1; thence north 7° 35' west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning."

Dated: May 11, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed May 11, 1954, Referee. [44]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF ORDER
OF REFEREE

The petition of Clarence E. and Winifred Polikowsky respectfully represents:

To: Reuben G. Hunt, Esq., Referee in Bankruptcy.

I.

That your petitioners are the claimants concerning a certain vendor's lien in and to the real property hereinafter described.

II.

That heretofore your petitioners filed their petition praying for an order impressing a vendor's lien upon the hereinafter-described property upon the grounds and for the reason that pursuant to the provisions of Section 3046 of the Civil Code of the State of California in that said petitioners

sold said real property and have a lien thereon for the purchase price thereof unsecured otherwise than by the personal obligation of the buyer; that said petition was by said Referee denied and the following order was made, to wit:

“Now, Therefore,

“It Is Ordered that the petition of Clarence [45] E. Polikowsky and Winnifred Polikowsky in reclamation in the within proceedings be and the same hereby is disallowed, and it be and it hereby is fixed and determined that the following described real property is the property of this bankrupt estate free and clear of any claim in or to the said property on the part of or on behalf of the said Clarence E. Polikowsky and Winnifred Polikowsky:

“ ‘That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“ ‘Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of

135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.' "

III.

That said Order is erroneous for the following reasons: [46]

1. That there is no evidence to support the conclusion of the Referee that Kenneth P. Schmidt and Mary Wilkins Schmidt were not purchasing parties in said contract of sale.

2. That there is no evidence to support the finding of the Court that said Kenneth P. Schmidt and Mary Wilkins Schmidt were third party guarantors on the note executed and given in consideration of the transfer of the said real property.

3. That there is no evidence to support the finding of the Court that the bankrupt corporation was not used to perpetrate an injustice and inequity.

4. That there is no evidence to support the conclusion of the Referee that the bankrupt corporation should be regarded as a separate entity from Kenneth P. Schmidt in connection with the petition concerning the vendor's lien claimed herein.

5. That there is no evidence to support the finding of the Court that the vendor's lien of petition-

ers was waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt.

6. That there is no evidence to sustain the Referee's decision that said vendor's lien was waived by agreeing that the title to the real property should be transferred free of encumbrances, taxes and district levies.

7. That there is no evidence to support the finding of the Referee that the petitioners waived their vendor's lien by knowingly transferring title to the bankrupt corporation so that said bankrupt corporation might use the said real property as the subject of other encumbrances.

8. That the evidence does not sustain the judgment of the Court and the conclusions of law from the findings of the Court are in error.

Wherefore, your petitioners pray for a review of said Order by the Judge; that the said order be vacated and set aside and that [47] the vendor's lien of the petitioners herein be declared a good and sufficient vendor's lien.

Dated: This 18th day of May, 1954.

BLANCHE & FUELLER,

By /s/ JOHN K. BLANCHE,
Attorneys for Petitioners, Clarence E. and Winnifred Polikowsky.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1954, Referee. [48]

[Title of District Court and Cause.]

AMENDED PETITION FOR REVIEW OF
ORDER OF REFEREE

To: Reuben G. Hunt, Esq., Referee in Bankruptcy.

The amended petition of Clarence E. and Winnifred Polikowsky respectfully represents:

I.

Your petitioners hereby incorporate and make a part hereof by reference for each and every purpose the petition for order for review of Referee heretofore filed on or about May 19, 1954.

II.

As a supplement and amendment thereto your petitioners point out with particularity and contentions in connection with said Referee's order and judgment, as follows:

1. There Is No Evidence to Support the Conclusion of the Referee That Kenneth P. Schmidt and Mary Wilkins Schmidt Were Not Purchasing Parties in Said Contract of Sale.

All of the evidence in connection with the identity of the purchasing parties is as follows: [50]

During the negotiations for purchase of the property Mr. Schmidt carried on his negotiations as an individual. (Rep. Tr. 11-19-53, page 4.) Mr. Schmidt—"A. Well, I think they actually believed they were dealing with myself as an individual." (Rep. Tr. 11-19-53, page 18.) "Q. As you recall it, at the

conclusion of the various negotiations you told Mr. MacArthur that it was desired that the property be taken in the name of the corporation? A. (Mr. Schmidt): Yes.”

The escrow instructions, Exhibit 3, were executed by Kenneth P. Schmidt, individually, and Kenneth P. Schmidt Builders, Inc., a corporation, as purchasers.

The escrow instructions of December 5, 1952, being petitioners Exhibit 4, provide for signatures by the corporation and Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, but there was no execution by the corporation but only by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually.

It is the contention of the petitioners that Kenneth P. Schmidt and Mary Wilkins Schmidt were purchasing parties and not merely guarantors.

“With respect to parties, contracts for the sale of real property are governed by substantially the same rules as other contracts.” 66 C.J.P. 512.

An accommodation party is one who has signed the instrument as a maker for the purpose of lending his name and credit to some other credit. 8 Cal. Jur. 2nd, P. 422.

“One who receives value for his signature on a note cannot set up the defense of accommodation.” 8 Cal. Jur. 2nd, P. 423.

In the hearing on March 4, 1954, Mr. Schmidt testified as follows:

(Rep. Tr. page 13) Mr. Schmidt “* * * All I did was spend several thousand dollars engineering the

map, and it is ready to record, the subdivision, but was never encumbered or to my knowledge [51] used as an asset in the corporation.”

The foregoing testimony indicates clearly that the Schmidts individually were interested in the purchase as they were jointly obligated on the escrow instructions which were the only written agreement between the parties, and they were interested in the purchase or Schmidt would not have spent several thousand dollars engineering, or if the money were corporate money he at least considered it his for all purposes. Upon the uncontradicted testimony of the president of the bankrupt corporation Schmidt and his wife were not third party guarantors.

2. There Is No Evidence to Support the Finding of the Court That Kenneth P. Schmidt and Mary Wilkins Schmidt Were Third Party Guarantors on the Note Executed and Given in Consideration of the Transfer of the Said Real Property.

There is no evidence in the record which indicates that Mary Wilkins Schmidt and Kenneth P. Schmidt did not receive any value for their signatures on the promissory note and on the face of the promissory note they were original makers.

The same testimony and reasoning indicating that the Schmidts were purchasing parties as hereinbefore set forth is here applicable.

3. There Is No Evidence to Support the Finding of the Court That the Bankrupt Corporation Was

Not Used to Perpetrate an Injustice and Inequity.

When a corporation is merely used as the convenient method of doing business and there is no attempt on the part of the sole stockholder to segregate the business of the corporation from his own he will not be heard to contend that he and the corporation are separate entities. *Goldberg vs. Engelberg*, 34 Cal. App. 2d 10.

In the present case there was no attempt to segregate the affairs of Schmidt from those of his solely owned corporation and an indication thereof is found in the hearing of 11-19-53 as follows:

(Rep. Tr., page 19) "Q. In connection with your operation [52] of the corporation it is a fact that you expended corporate moneys with reference to your own home; is that right, and subsequently transferred the home to the corporation? A. (Mr. Schmidt): Yes, sir."

The Referee, in his published opinion, stated that the consideration of the corporation as being the same thing as its sole stockholder would be an idle account inasmuch as, although Schmidt and his wife had signed the note and were liable thereon, it would not gain the vendor anything by having the corporation declared to be the alter ego of the corporation. Furthermore, the Referee does not apparently consider that any inequity or injustice results wherein a vendor is deprived of his property without payment therefor by reason of the ability of the purchasers to claim that one is a purchaser and the other a guarantor although the purchaser

and guarantor are one and the same. In other words, in this case the defense has raised the question of separate identity by claiming that the corporation and its sole stockholder are completely separate and by so doing are thus entitled to retain property not paid for and thus perpetrate an injustice and inequity which would otherwise not obtain. The cases in California in connection with the refusal to recognize the separate entity of a corporation and its sole stockholder when injustice or inequity would thereby result. Some of such cases are as follows:

Wenban Estate vs. Hewlett, 193 Cal., 675; 12 Cal. Jur. 2d 606; Gordon vs. Aztec Brewing Co., 33 Cal. 2d 514; Groether vs. Meyer Rosenberg, Inc., 11 Cal. App. 2d 268.

4. That There Is No Evidence to Support the Finding of the Court That the Vendor's Lien Was Waived by the Acceptance of the Signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt.

If all three persons executing the escrow instructions and executing the promissory note were the joint purchasers, or if by reason of the piercing of the corporate veil the Court finds in its [53] equitable jurisdiction that an inequity did result after separate entities were otherwise recognized, then Kenneth P. Schmidt and Mary Wilkins Schmidt were not the signatures of third parties and the lien of the vendor would not be waived by accepting them as co-makers upon a promissory note although the property was transferred to the

corporation only at the request of all of the purchasers. It seems unnecessary to cite authority to the effect that the community interest of Mary Wilkins Schmidt in the outcome of the corporate activities owned by her husband would constitute her an interested party rather than a disinterested third party.

5. There Is No Evidence to Sustain the Referee's Decision That Said Vendor's Lien Was Waived by Agreeing That the Title to the Real Property Should Be Transferred Free of Encumbrances, Taxes and District Levies.

The sellers agreed to convey a sufficient title to entitle vendees to procure a standard owners Title Insurance and Trust Company policy.

The standard owners Title Insurance and Trust Company policy which was procured by its very terms excepted liens and encumbrances not of record. Your petitioners respectfully petition this Court to introduce evidence to the effect that the standard owners policy of the Title Insurance and Trust Company as contemplated on October 30, 1952, provided for the exception of liens and encumbrances not of record. By its very terms a Vendor's lien is an implied lien and not one of record and is thus specifically excepted by the escrow instructions and the agreement to convey free and clear of record encumbrances, not being an agreement to convey free of encumbrances but merely that the record show the same to be free of encumbrances, does not constitute a waiver of the Vendor's lien.

6. There Is No Evidence to Support the Finding of the Referee That the Petitioners Waived Their Vendor's Lien by Knowingly Transferring Title to the Bankrupt Corporation [54] So That Said Bankrupt Corporation Might Use the Said Real Property as the Subject of Other Encumbrances.

There was no estoppel as a result of the transfer of the record title inasmuch as the corporation did not convey the property to any third person and no rights of intervening third persons ever accrued. (Rep. Tr. 3-4-54, page 12.)

The fact that the parties originally contemplated that vendors did accept a second deed of trust, subject to first deed of trust to be placed for corporation loan did not serve to waive the Vendor's lien inasmuch as the Vendors had not as yet received the lien and Vendors do not waive in advance a lien which they have not yet received until the property be transferred. *Malthy vs. Conklin*, 50 Cal. App. 201; *Finnell vs. Finnell* 156 Cal. 589.

7. The Evidence Does Not Sustain the Judgment of the Court and the Conclusions of Law From the Findings of the Court Are in Error.

It is the finding of the Referee that the Schmidts were husband and wife and that Schmidt owned and controlled practically all of the capital stock and dominated and controlled the corporation.

According to the uncontradicted testimony of the broker, Mr. Schmidt told the broker for the Polikowskys that he was the sole owner of the stock of the corporation. (Rep. Tr. 3-4-54, page 37.)

The Vendors were led to believe by the grantee

that there was no effectual difference between the corporation and the individuals and the corporation was merely a matter of form. Until the rights of the third parties intervened by reason of estoppel or otherwise, the Vendors are entitled to a lien for such portion of the purchase price that remains unpaid and otherwise unsecured unless they have specifically waived it in some manner. It is contended that there was no intent to waive the lien by any act of the Vendors, either by the acceptance of the note of the purchasers or otherwise, and that the petition of the Vendors should have been granted. [55]

Respectfully submitted,

BLANCHE & FUELLER,

By /s/ JOHN K. BLANCHE,
Attorneys for Petitioners Clarence E. & Winnifred
Polikowsky.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1954, Referee. [56]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PETITION FOR REVIEW OF ORDER OF REFEREE FILED BY CLARENCE E. AND WINNIFRED POLIKOWSKY

To the Honorable Harry C. Westover, Judge of the United States District Court:

Comes now Frank M. Chichester, by and through his counsel, Craig, Weller & Laugharn, respondent in the above-captioned matter, and does hereby make the following objections and suggestions to the Findings of Fact, Conclusions of Law and Order filed herein by Blanche & Fueller on behalf of Clarence E. and Winnifred Polikowsky:

I.

Respondent herein objects to Paragraph III of the Findings on the basis that the court's directions from the bench after argument specifically rejected the provisions set forth in the Findings proposed by the petitioners and refused to find or determine whether or not the Referee's findings on the question of the purchaser were correct or not. Accordingly, respondent suggests that the Finding of Fact number III should read as follows:

"On October 30, 1952, an escrow was opened between the Polikowskys, as sellers of the said real property, and [60] the bankrupt as the buyer of the same, at the Mutual Savings and Loan Association of Pasadena (hereinafter referred to as 'escrow

holder') to accomplish the transfer of the said real property. On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth the purchase agreement in writing as follows: The bankrupt corporation was to give its promissory note to the sellers in the sum of \$20,000.00, the said note also to be signed by the bankrupt corporation and Kenneth P. Schmidt, personally, and to be secured by a second deed of trust on the said real property and the said second deed of trust to be subordinated to a trust deed later to be given by the bankrupt corporation and said real property to secure construction loans for the houses projected on the said real property. The sellers were also to furnish a title insurance policy showing title vested in the bankrupt corporation free of encumbrances except specified taxes and special levies. The said title policy was so furnished and provided. The said policy also stated that it did not cover liens which are not shown by the public record."

II.

Respondent objects to Paragraph IV of petitioners' suggested Findings because the uncontradicted written evidence indicates that the amendatory parties were actually Kenneth P. Schmidt Builders, Inc., and the petitioners here, otherwise the document of December 5, 1952, would be a nullity. On this basis, respondent submits that Finding number IV should read as follows:

"After October 20, 1953, it appearing that the

transaction could not be completed upon the basis above mentioned, the [61] Polikowskys and the bankrupt corporation amended on December 5, 1952, the said escrow instructions by deleting therefrom all mention of the second deed of trust to have been given to the Polikowskys as above stated and to substitute therefor the individual security of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt along with that of the corporation on the said promissory note for \$20,000.00. These amended instructions were signed by the Polikowskys and the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually.”

III.

Respondent objects to Finding of Fact number VIII on the grounds that it attempts to establish the basis for a conclusion of law of an attempted determination as to an “alter ego” corporation. Respondent’s attorney, on argument, attempted to discuss this matter with the court and was informed that the court would make no determination whatsoever as to whether or not there was an alter ego corporation in this instance. The court at this time instructed and directed that its only findings and determination would be:

(1) That the purchaser of the property was not the bankrupt corporation. The court, in discussion with respondent’s counsel refused to determine that the purchasers were Kenneth P. Schmidt or his wife and stated that the court did not know and

would not find who the purchasers were but only that the corporation was not the purchaser.

(2) That since the corporation was not the purchaser, there was no jurisdiction in the bankruptcy court to determine this matter and that on that basis the [62] matter should be dismissed and the Polikowskys left to their rights in the state courts.

IV.

Respondent objects to Conclusions of Law II, III, IV and VII on the grounds that as set forth hereinabove the court specifically stated that it was making no determinations as to an "alter ego" corporation or as to any other facet of the case other than the jurisdictional question. In view of this, said Conclusions of Law II, III, IV and VII are completely erroneous since they would involve a reversal of all the Findings of Fact made by the bankruptcy Referee, and would necessitate rejecting the determination of the Referee on points of conflicting evidence.

V.

Respondent objects to Conclusions of Law number V on the grounds that there is no evidence whatsoever in the record on which to base such a finding.

VI.

Respondent objects to Conclusions of Law VI, VIII, IX and X on the grounds that the same are a reversal of the Referee's findings and conclusions based upon conflicting evidence. Furthermore, this

reviewing court indicated, in response to question from counsel for the respondent, that it was not making any determination on the question of vendor's liens, their existence or their waiver, and, indeed, refused to permit argument on this point saying that the whole question was one of jurisdiction. Therefore, respondent respectfully requests the rejection of Conclusions of Law VI, VIII, IX and X and in substitution therefor, in line with the court's direction which counsel for the petitioners have deliberately disregarded:

“That the court finds and concludes as a matter of law that the bankruptcy court had no summary jurisdiction over the property involved in this matter so as to [63] enable it to determine any questions as to the title or ownership thereof, or liens thereon.”

VII.

Respondent objects to the “Order” prepared herein on the grounds that the same does not agree with the court's direction and voiced determination. It is respectfully suggested that the following order is in precise compliance therewith:

“It is ordered that the petition of the petitioners, Clarence E. and Winnifred Polikowsky, be and the same hereby is denied in part and allowed in part, and it be and hereby is fixed and determined that this bankruptcy court has no jurisdiction to determine questions of title or right in and to the following described real property:

“That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of Cali-

fornia, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

“Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1 thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch [64] cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.”

And, it is further ordered that the determinations here are without prejudice to any of the parties in further proceedings in other courts.

Respectfully submitted,

CRAIG, WELLER &
LAUGHARN,

By /s/ [Indistinguishable]

Attorneys for Respondent.

[Endorsed]: Filed August 26, 1954, U.S.D.C.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ON PETITION FOR
REVIEW OF ORDER OF REFEREE

This matter came on for hearing on July 19, 1954, upon the petition of Clarence E. and Winnifred Polikowsky for review of the order of Referee Reuben G. Hunt, entered May 11, 1954, said petition being for the purpose of reviewing an order wherein said Referee denied a petition to fix a vendor's lien on said real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, the trustee having appeared by and having been represented through his counsel Craig, Weller & Laugharn, by C. E. H. McDonnell, and the respondents, Kenneth P. Schmidt and Mary Wilkins Schmidt, having appeared by and having been represented by and through their counsel Lawrence M. Cahill, and the petitioners, Clarence E. and Winnifred Polikowsky having appeared by and having been represented by Blanche & Fueller by John K. Blanche, and the Court having reviewed the evidence and the exhibits on file therein as set forth in the Referee's certificate and it appearing therefrom that the evidentiary facts are not in dispute; that the conclusions of the [66] Referee based upon the undisputed facts are incorrect and without support and it appearing to the Court that a grave injustice would result if the decision of the Referee were upheld; and the

Court being fully advised in the premises does now make the following findings of fact and conclusions of the law and order based thereon.

Findings of Fact

I.

The Court finds as true that at all times mentioned herein Kenneth P. Schmidt and Mary Wilkins Schmidt were and now are husband and wife; that the bankrupt was a California corporation engaged in the business of constructing homes on building tracts and selling them to the public. Kenneth P. Schmidt owned and controlled practically all of the capital stock of the bankrupt corporation and was its president and one of its directors. He dominated and controlled the corporation. These facts were known to the Polikowskys, the respondents and real parties of interest herein.

II.

Prior to October 30, 1952, Kenneth P. Schmidt negotiated with the Polikowskys, through their agent, for the sale of the real estate herein involved by the Polikowskys to the bankrupt corporation.

III.

On October 30, 1952, an escrow was opened between the Polikowskys, as sellers of the real property, and Kenneth P. Schmidt and Mary Wilkins Schmidt, as buyers of the same, at the Mutual Savings and Loan Association of Pasadena (herein-

after referred to as "escrow holder") to accomplish the transfer of the said real property.

On October 30, 1952, the Polikowskys and the bankrupt corporation and Kenneth P. Schmidt, individually, signed and filed with the escrow holder instructions setting forth a purchase agreement in writing which provided as follows: The buyers were to give a promissory note to the sellers in the sum of \$20,000.00 which note [67] was to be executed by the bankrupt corporation and Kenneth P. Schmidt, personally, which promissory note was to be secured by a second deed of trust on the said real property and which said second deed of trust was to be subordinated to a trust deed later to be given upon said real property to secure construction loans to be made by any savings and loan association for the construction of improvements on the property. The sellers also agreed to furnish a title insurance policy showing record title vested in the bankrupt corporation free of encumbrances, except specified taxes and special levies.

IV.

That thereafter, it appearing that the transaction could not be completed on the basis above mentioned, the Polikowskys and Kenneth P. Schmidt and Mary Wilkins Schmidt amended the purchase agreement on December 5, 1952, by deleting from said escrow instructions all mention of the second deed of trust which was provided to have been given to the Polikowskys, and to substitute therefor as consideration for the transfer of said real prop-

erty a promissory note in the sum of \$20,000.00, executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually. These amended instructions were signed by the Polikowskys and by Kenneth P. Schmidt and Mary Wilkins Schmidt but not by the bankrupt corporation.

V.

Pursuant to said amended escrow instructions a promissory note in the sum of \$20,000.00 was executed by the bankrupt corporation and by Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, and delivered into said escrow; and the sellers executed and delivered into said escrow a deed vesting title to the said real property in the bankrupt corporation, subject to covenances, conditions, restrictions, reservations, rights of way and easements of record, if any. Thereupon the said escrow was closed, the said [68] deed was delivered to the purchasers, and the said promissory note was delivered to the Polikowskys.

VI.

Neither the whole nor any part of said promissory note has ever been paid, which promissory note, by its terms, became due on June 5, 1953.

VII.

The said real property has never since been transferred nor encumbered by the purchasers.

VIII.

That at all times herein mentioned the bankrupt corporation was under the control and domination of Kenneth P. Schmidt; that Kenneth P. Schmidt was the sole stockholder; that he requested the title to said real property herein mentioned to be placed in the name of the corporation for his personal convenience; that at all times herein mentioned the employees of the board of directors were employees of Kenneth P. Schmidt and were appointed by him as members of the board of directors of said bankrupt corporation and at all times held their membership at his sufferance and subject to his dismissal at any time; that at all times mentioned herein the officers of said bankrupt corporation were employees of said Kenneth P. Schmidt who held their offices at his sufferance and were subject to dismissal from their office at any time; that said Kenneth P. Schmidt commingled his funds and his real property with the funds and real property of the corporation; that the books and records of the corporation were loosely kept; that at no time prior to the filing of the bankruptcy proceedings did the real property appear upon the books of the corporation; that at the time of the transfer and prior thereto said Kenneth P. Schmidt represented to the petitioners, Clarence E. and Winnifred Polikowsky, that he and the corporation were one and the same and that he was the sole owner and stockholder therein. [69]

Conclusions of Law

As conclusions of law from the foregoing facts the Court finds as follows:

I.

The purchasers of the real property involved herein were Kenneth P. Schmidt and Mary Wilkins Schmidt and the title to the real property was placed in the name of the corporation for convenience only.

II.

That in this particular case equity requires that the separate entity of the bankrupt corporation and its individual owners be disregarded and that it be deemed, for the purpose of this transaction, that the transfer of said real property to said bankrupt corporation was actually a transfer of said real property to Kenneth P. Schmidt and Mary Wilkins Schmidt.

III.

That in order to protect the rights and equities of third parties and to prevent a grave miscarriage of justice, it is necessary that the separate corporate entity of the bankrupt and its individual owners be disregarded.

IV.

That Kenneth P. Schmidt and Mary Wilkins Schmidt are by their conduct estopped from asserting that the bankrupt corporation is a separate entity as distinguished from themselves as individuals.

V.

That no rights of innocent third persons have intervened as encumbrancers or purchasers and no facts are disclosed whereby said Clarence E. and Winnifred Polikowsky, the petitioners herein, are estopped from asserting or have waived their vendor's lien.

VI.

That it is not true that the purchaser of the real property [70] involved herein is Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt, individually, appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property.

VII.

It is not true that the bankrupt corporation is not the alter ego of Kenneth P. Schmidt, individually, and is a separate entity distinct from Kenneth P. Schmidt, even though he owned or controlled practically all of the capital stock of the corporation and controlled and dominated its affairs.

VIII.

by the Polikowskys herein has been waived by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the

That it is not true that the vendor's lien asserted

promissory note given as consideration for the transfer of the said real property.

IX.

That it is not true that the vendor's lien asserted herein by the Polikowskys has been waived by agreeing the title to the real property should be transferred free of encumbrances, taxes and district levies and by deed transferring title subject to reservations but not including a reservation of a vendor's lien.

X.

That it is not true that the vendor's lien asserted herein by the Polikowskys was waived by knowingly transferring title to the bankrupt corporation without encumbrance of record so that the said bankrupt corporation might use the said real property as the subject of other encumbrances to secure loans for the purposes of construction on the said real property.

Let Judgment Be Entered Accordingly.

Dated: This 30th day of September, 1954.

/s/ HARRY C. WESTOVER,

Judge of the United States
District Court.

Lodged August 19, 1954.

[Endorsed]: Filed September 30, 1954, U.S.D.C.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 57,339-HW

In the Matter of

KENNETH P. SCHMIDT BUILDERS, INC., a
Corporation,

Bankrupt.

JUDGMENT ON PETITION FOR REVIEW
OF THE ORDER OF REUBEN G. HUNT,
REFEREE

This matter came on for hearing on July 19, 1954, upon the petition of Clarence E. and Winnifred Polikowsky for review of the order of Referee Reuben G. Hunt, entered May 11, 1954, said petition being for the purpose of reviewing an order wherein said Referee denied a petition to fix a vendor's lien on said real property standing in the name of Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, which property is located in Pasadena, California, the trustee having appeared by and having been represented through his counsel Craig, Weller & Laugharn, by C. E. H. McDonnell, and the respondents, Kenneth P. Schmidt and Mary Wilkins Schmidt, having appeared by and having been represented by and through their counsel Lawrence M. Cahill, and the petitioners, Clarence E. and Winnifred Polikowsky having appeared by and having been represented by Blanche & Fueller by John K. Blanche, and the Court having reviewed the evidence and the exhibits on file therein as set forth in the Referee's certifi-

cate and it appearing therefrom that the evidentiary facts are not in dispute; that the conclusions of the [72] Referee based upon the undisputed facts are incorrect and without support and it appearing to the Court that a grave injustice would result if the decision of the Referee were upheld; and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law and Order based thereon, and having directed that judgment be entered in accordance therewith.

Now, Therefore, It Is Ordered, Adjudged and Decreed as Follows:

1. That the order of the Referee, entered May 11, 1954, be and the same is hereby set aside.

2. That the Findings of Fact and Conclusions of Law as set forth in the order of Referee Reuben G. Hunt, entered May 11, 1954, in the above-entitled matter, be and the same are hereby corrected and amended to conform to the Findings of Fact and Conclusions of Law as entered by this Court.

3. That Kenneth P. Schmidt Builders, Inc., a corporation, bankrupt herein, has no right, title nor interest in and to the following described real property, to wit:

That portion of Lot 1 in Tract 1032, in the City of Pasadena, County of Los Angeles, State of California, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the County Recorder of said County, except that portion thereof described as follows:

Beginning at a 4-inch pipe monument set at

the most northwesterly corner of said Lot 1; thence north $82^{\circ} 22' 32''$ each along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive, formerly San Rafael Drive, through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence south $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence north $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.

4. That the real parties in interest and the real purchasers of said real property are Kenneth P. Schmidt and Mary Wilkins Schmidt [73] and subject to any rights of any persons not herein involved, said real property is owned by said Kenneth P. Schmidt and Mary Wilkins Schmidt and they are entitled to all right, title, interest and possession therein, subject to any rights therein which may hereafter be declared by a Court of competent jurisdiction in favor of the petitioners, Clarence E. Polikowsky and Winnifred Polikowsky.

5. It Is Further Ordered, Adjudged and Decreed that the petitioners, Clarence E. and Winnifred

Polikowsky, be and hereby are authorized and permitted to bring suit in the Courts of the State of California for the purpose of imposing their vendor's lien, if any they have.

6. It Is Adjudged that whereas said Kenneth P. Schmidt and Mary Wilkins Schmidt are not in bankruptcy; that this court has no jurisdiction to determine the validity of the vendor's lien of the petitioners herein as against said Kenneth P. Schmidt and Mary Wilkins Schmidt.

Dated: This 30th day of September, 1954.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Lodged August 19, 1954.

[Endorsed]: Filed and entered September 30, 1954. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Frank M. Chichester, trustee in bankruptcy for Kenneth P. Schmidt Builders, Inc., bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment on Petition for Review" entered in this matter on September 30, 1954.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed October 13, 1954. [75]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

Comes now Frank M. Chichester, trustee in bankruptcy for Kenneth P. Schmidt Builders, Inc., a corporation, bankrupt, and presents herewith the points on which he intends to rely in support of his contention that the District Court erred:

1. In setting aside the order of the Referee in this matter entered May 11, 1954.

2. Ordering and directing that the Findings of Fact, Conclusions of Law of the Referee, entered May 11, 1954, be corrected and amended to conform with the Findings of Fact and Conclusions of Law entered by the District Court.

3. In holding and ordering that Kenneth P. Schmidt Builders, Inc., a corporation, the bankrupt herein, had no right, title or interest in and to the real property which was the subject of this litigation.

4. In holding and determining that the real parties of interest and the real purchasers of the real property involved in this litigation were and are Kenneth P. Schmidt and Mary Wilkins Schmidt and that Kenneth P. Schmidt and Mary Wilkins Schmidt are [78] the owners of the said real property and entitled to all right, title and interest therein and possession thereof subject to any rights therein which may thereafter be declared by a court of competent jurisdiction in favor of the petitioners, Clarence E. Polikowsky and Winnifred Polikowsky.

5. In adjudging that the bankruptcy court had no jurisdiction to determine the validity of the vendor's lien of Clarence E. and Winnifred Polikowsky in and to the subject real property.

6. In finding as a matter of fact that on October 30, 1952, an escrow was opened between Clarence E. and Winnifred Polikowsky, as sellers of the subject real property, and Kenneth P. Schmidt and Mary Wilkins Schmidt, as buyers of the said real property, at the Mutual Savings and Loan Association of Pasadena.

7. In finding as a matter of fact that the original escrow instructions involving this property were amended only by Kenneth P. Schmidt, Mary Wilkins Schmidt and Clarence E. and Winnifred Polikowsky.

8. In finding that upon the close of the escrow involving the subject property the deed thereto was delivered to Kenneth P. Schmidt and Mary Wilkins Schmidt and not to the bankrupt corporation.

9. In finding that as a matter of fact that Kenneth P. Schmidt requested the title to the real property which is the subject of this litigation be placed in the name of the bankrupt corporation for his personal convenience.

10. In finding that as a matter of fact the employees and officers of the Board of Directors of the bankrupt corporation were in fact the employees and officers of Kenneth P. Schmidt individually.

11. In finding that as a matter of fact that at the time of the transfer and prior thereto, Kenneth

P. Schmidt represented [79] to Clarence E. and Winnifred Polikowsky that he and the corporation were one and the same.

12. In concluding as a matter of law that the purchasers of the real property involved in this litigation were Kenneth P. Schmidt and Mary Wilkins Schmidt and that the title to the real property was placed in the name of the corporation for convenience only.

13. In concluding as a matter of law that the separate corporate entity of the bankrupt be disregarded.

14. In concluding that as a matter of law Kenneth P. Schmidt and Mary Wilkins Schmidt are by their conduct estopped from asserting that the bankrupt corporation is a separate entity distinct from themselves as individuals.

15. That the court erred as a matter of law in concluding that Clarence E. and Winnifred Polikowsky are not estopped from asserting their vendor's lien.

16. In concluding as a matter of law that Clarence E. and Winnifred Polikowsky have not waived their vendor's lien.

17. In concluding that as a matter of law that the purchasers of the real property involved is not Kenneth P. Schmidt Builders, Inc., the bankrupt corporation, and that the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt do not appear as co-makers on the note given by the corporation in consideration of the transfer of the said real property, and that Clarence E. and Winnifred Poli-

kowsky have not waived their vendor's lien by the acceptance of the signatures of Kenneth P. Schmidt and Mary Wilkins Schmidt as co-makers on the promissory note given as consideration for the transfer of the said real property.

18. In concluding as a matter of law that the vendor's lien has not been waived by Clarence E. and Winnifred Polikowsky but agreeing that the title to the real property should be transferred free of encumbrances, taxes and district levies and by a [80] deed transferring title subject to these reservations but not including the reservation of a vendor's lien.

19. In concluding as a matter of law that the vendor's lien herein was not waived by Clarence E. and Winnifred Polikowsky by knowingly transferring title to the bankrupt corporation without encumbrances of record so that the said bankrupt corporation might use the said real property as a subject of other encumbrances to secure loans for the purpose of construction on the said real property.

Dated: November 16, 1954.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Trustee.

[Endorsed]: Filed November 17, 1954. [81]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 57,339-W

In the Matter of

KENNETH P. SCHMIDT, INC., a Corporation,
Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS AT CONTINUED HEARING ON
ORDER TO SHOW CAUSE, POLIKOWSKY
VS. RECEIVER

Appearances:

For Frank M. Chichester, Trustee:

CRAIG, WELLER & LAUGHARN, By
C. E. H. McDONNELL, ESQ.

For the Bankrupt Corporation, Kenneth P. and
Mary Wilkins Schmidt:

LAWRENCE M. CAHILL, ESQ.

For Clarence E. and Winnifred Polikowsky:

BLANCHE & FUELLER, By
CHARLES M. FUELLER, ESQ., and
JOHN K. BLANCHE, ESQ.

Frank M. Chichester, Trustee:

In pro per.

November 19, 1953, 10 A.M.

The Referee: In the matter of Kenneth P. Schmidt, Inc., order to show cause, Polikowsky against the Receiver.

Mr. Blanche: We would like to call Mr. Schmidt as an adverse witness.

The Referee: Under Section 21-J of the Bankruptcy Act?

Mr. Blanche: Yes, your Honor.

KENNETH P. SCHMIDT

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

Direct Examination

By Mr. Blanche:

Q. Mr. Schmidt, you are connected with Kenneth P. Schmidt Builders? A. Yes, sir.

Q. In what capacity? A. President.

Q. That is a California corporation?

A. Yes, sir.

Q. Last summer you had some dealings with Clarence Polikowsky and his wife through a broker in connection with the sale of approximately five acres of land in Pasadena? A. Yes, sir.

Q. About when did those negotiations first take [2*] place?

A. I don't recall the dates. It has been some time ago. It has been a year ago, about.

Q. It was about a year ago? A. Yes, sir.

Q. At that time who did you talk to?

A. The broker, Mr. MacArthur.

(Testimony of Kenneth P. Schmidt.)

Q. In your conversations with him was there any discussion with reference to who the purchaser was?

A. Well, I don't actually recall. I approached him to buy the property, the broker. Do you mean as to how title would be vested at the early time of investigation?

Q. That is right.

A. Honestly I don't recall.

Q. Do you recall during the negotiations as to when the question or fact that the title was to be taken in the name of Kenneth P. Schmidt Builders, Inc., first came up?

A. No, I do not. When we had an understanding, when we got together on the deal, I told the broker that I would like to have title vested in the corporation because the corporation, the building project in Monterey Park—we wanted to build these particular houses in that particular corporation.

Q. Until the time you told the broker that you wanted title taken in the name of the corporation was there any statement made by you as to who the purchaser really was? [3]

A. I don't believe so. I think I was just representing that I was negotiating for the property, and we were agreed on the property. I said I would like to take title in the corporation. Now, that is to the best of my knowledge.

Q. Did you ever see any letters written by the broker to the Polikowskis in connection with this?

A. Yes, I did.

(Testimony of Kenneth P. Schmidt.)

Q. Did they refer to you individually rather than to the corporation?

A. I believe they were always looking to me individually because I guaranteed it as an individual.

The Referee: That is not the point, Mr. Schmidt. What did the letters say, if you remember?

The Witness: Well, I think they actually believed they were dealing with myself as an individual.

The Referee: That is not a sufficient answer. What did the letters say, sir? That is what I want to know.

The Witness: I don't recall.

The Referee: All right.

Mr. Cahill: Do you have the letters, counsel?

The Referee: We have not identified the name of the broker in the record.

Mr. Blanche: I don't believe so, not yet, your Honor.

Mr. Cahill, here is a copy of the letter (handing document to counsel). [4]

Mr. Cahill: Thank you, sir.

Mr. Blanche: I will show the witness a copy of a letter dated October 5th.

The Referee: What year?

Mr. Blanche: 1952, your Honor.

Q. Mr. Schmidt, do you recall having seen a letter similar to that or to the same tenor and effect?

A. Yes. I recall having seen one.

Mr. Blanche: I would like to offer this, if the Court please.

(Testimony of Kenneth P. Schmidt.)

The Referee: Is there any objection?

Mr. Cahill: It is a copy. Do you have the original?

Mr. Blanche: I believe the Polikowskis have it possibly up in Happy Camp. I don't know where it is.

Mr. Cahill: We will waive objection, your Honor.

Mr. Blanche: This is a letter dated October 5, 1952, from Harold T. McArthur to Mr. and Mrs. C. C. Polikowski.

The Referee: That will be Petitioners' Exhibit 1.

(The letter dated October 5, 1952, was marked Petitioners' Exhibit 1.)

PETITIONER'S EXHIBIT No. 1

October 5, 1952.

Mr. and Mrs. C. E. Polikowsky,
Box 41,
Happy Camp, California.

Dear Mr. and Mrs. Polikowsky:

We have submitted your 5½ acres located at Armada Drive and Prospect Boulevard to a well-known local builder whom you may know, Mr. Kenneth P. Schmidt.

Mr. Schmidt builds homes on a large scale. For instance, you may recall the great number of homes he built on the west side of the arroyo north of Devil's Gate Dam near the Flintridge Country Club. He is now building several hundred homes south

(Testimony of Kenneth P. Schmidt.)

of the old Midwick Country Club grounds near Garvey and Fremont Avenues. He has been engaged in other large building ventures also, and has supplied us with references to submit to you as his proposition is somewhat unusual.

He has made us the following verbal offer and we have agreed to write you giving the details rather than to attempt to draw up a formal offer at this stage:

(1) He agrees to the price of \$21,500 provided you are agreeable to waiting six months for your money plus 6% interest beginning 30 days from the date of opening the escrow;

(2) He will put up a \$15,000 Bond as a means of guaranteeing completion of the subdividing of the land including installation of the street, sewer lines and utilities within that period;

(3) He has arranged for financing for the erection of homes on the various lots to be created, this financing to be handled by Mutual Savings and Loan Association, Colorado Street near Garfield Ave.; the exact amounts of the respective loans would necessarily be determined at a later date, but he does business with them and has assurance of financing through their Mr. Caspers;

(4) You would receive a blanket second trust deed loan in the amount of \$21,500.00, due in six months plus the 6% interest, the note to be subject

(Testimony of Kenneth P. Schmidt.)

to the various first loans; this loan would be the only loan temporarily, but by agreement would become subordinate to the first loans as they are created and release clauses would apply to the various lots during the six months period on payments of agreed amounts on your note so that he would be in a position to dispose of properties in the interim;

(5) Mr. Schmidt merely asks at this time for us to find out whether or not you are willing to wait six months for your money on such a plan, realizing that the legal details would have to be worked out to the satisfaction of both buyer and seller as to the bond, etc.;

(6) If you are agreeable to this general plan, subject to your approval of the workings out of matters referred to in the above paragraph (5), then he asks that he first be given one week of time to hire his engineers to study the land and make contacts with the City of Pasadena in order to determine a close estimate of the total cost to subdivide as the only estimate we have so far is \$10,000 exclusive of the cost for underground wiring; if the cost were to run \$15,000, for instance, then he would not be interested in the price of \$21,500. But he does not want to go to all the time and expense of determining what it would cost him to do all this work if you were not to be interested in his plan of purchase in the first place.

I have discussed this manner of purchase with my own attorney, but I have never handled a deal of

(Testimony of Kenneth P. Schmidt.)

this plan. Mr. Schmidt evidently has handled deals in this manner before and when he was told of your great amount of building experience, he stated that you would probably be more familiar with the plan than I am. Also, that the plan depends to a very considerable extent upon who the buyer is including general reputation. Mr. Harrison Baker's name came up in the conversation and he asked that Mr. Baker's name be mentioned as a reference thinking that you two probably know him also. Mr. Baker is the Baker of Harrison-Baker Company, realtors and long-time subdividers, located on Green Street just west of Los Robles. You most probably also know Mr. Caspers previously referred to.

We assume that you have your own attorney in Pasadena to handle the legal matters in case you tentatively approve the deal. If not, I can recommend our attorney, Mr. Charles M. Fueller, for such a case.

I realize very well that it is difficult to handle this proposition by mail. You would not receive any cash for a maximum of six months from the time of opening an escrow covering all items in detail. Apparently, we would have to wait that long for our commission fee, too, which is o.k. Mr. Schmidt is the type that acts fast and would have to do so to arrange for subdividing per requirements of the City and Sacramento, but apparently is in a position to agree to the six months due date anyway.

If you write us accepting such a proposition contingent upon your full satisfaction of the workings

(Testimony of Kenneth P. Schmidt.)

out of the legal details, then neither of you are to be regarded as definitely committed at that point, but it will permit Mr. Schmidt to get busy with his engineers for one week in estimating costs already mentioned. I hesitate to advise a trip to Pasadena in this regard until there are further developments.

Kindest personal regards,

HAROLD T. MacARTHUR.

HTM:t

Received in evidence November 19, 1953.

Q. (By Mr. Blanche): Mr. Schmidt, I show you copy of a letter dated October 10, 1952, addressed to you.

The Referee: From whom?

Mr. Blanche: From Harold T. McArthur, your Honor.

Q. Do you recall having received the original of that letter, Mr. Schmidt? [5]

A. I can't actually that I do, but I know Mr. McArthur gave me a copy of everything that transpired.

Q. This letter apparently is directed to you?

A. Well, it seems familiar.

The Referee: Will you speak a little louder, please?

Q. (By Mr. Blanche): You don't know where

(Testimony of Kenneth P. Schmidt.)

the original of this letter is? A. No, I do not.

Q. To the best of your recollection you did receive such a letter? A. Yes, sir.

Mr. Blanche: We will offer this letter, if the Court please.

The Referee: Petitioners' Exhibit 2. This is signed by H. T. McArthur, addressed to Mr. Schmidt, dated October 10, 1952.

(The letter referred to was marked Petitioners' Exhibit 2.)

PETITIONER'S EXHIBIT No. 2

October 10, 1952.

Mr. Kenneth P. Schmidt,
513-A South Atlantic Blvd.,
Monterey Park, California.

Re: Land at Armada Drive & Prospect Blvd.

Dear Mr. Schmidt:

We have received a letter from Mr. C. E. Polikowsky in reply to our letter dated October 5th, his letter reading as follows:

Happy Camp (California)
October 8, 1952.

Dear Mr. MacArthur:

Received your letter. I know of Mr. Kenneth P. Schmidt and that he is reputably and financially o.k. I will agree to paragraph (5) of your letter, also as to price, and time of payment.

Sincerely yours,

/s/ C. E. POLIKOWSKY.

(Testimony of Kenneth P. Schmidt.)

It is the understanding that you have a copy of the letter referred to above as being dated October 5th. Mr. W. W. Duncan has asked that you be supplied with the above exact copy of Mr. Polikowsky's reply dated October 8, 1952. Although all of the parties concerned realize that so far only preliminary points have been worked out, we feel very much encouraged by Mr. Polikowsky's reply letter as there are few people he would consider dealing with on such a plan of purchase.

Very truly yours,

H. T. MacARTHUR.

HTM:t

CC:WWD

Received in evidence November 19, 1953.

Q. (By Mr. Blanche): About how long after these negotiations were carried on did you come to a meeting of the minds and actually go to escrow, do you recall?

A. Perhaps 30 days, 30 or 60 days.

Q. Do you recall the escrow instructions and how they were signed?

A. I don't recall, but I believe they were put in the name of or drawn in the name of the corporation. [6]

Q. As a matter of fact, didn't you sign individu-

(Testimony of Kenneth P. Schmidt.)

ally and as president of the corporation on all escrow instructions? A. I don't recall.

Mr. McDonnell: Just a moment, your Honor.

The Referee: Do you want to make an objection?

Mr. McDonnell: Yes, your Honor.

The Referee: The answer will go out.

Mr. McDonnell: It seems to me the escrow instructions would be the best evidence of what the documents were that were signed.

The Referee: That is true.

Mr. Blanche: They should be here. As a matter of fact, counsel, don't you have copies that were furnished to you by the Mutual Building & Loan?

Mr. McDonnell: I don't know. The Receiver may have received them. I don't have a copy.

Mr. Blanche: The Mutual Building & Loan told me they sent copies. I saw their file and I assumed you had a full and complete file of all the escrow instructions.

The Referee: You did not request the Receiver to produce them, did you?

Mr. Blanche: No, your Honor, but I would like permission at the conclusion of the hearing to have those produced by subpoena. As a matter of fact I just obtained a subpoena for that purpose. [7]

The Referee: Very well.

Q. (By Mr. Blanche): In connection with the affairs of the corporation, you carried on all of these negotiations with the McArthur Company and the Polikowskis yourself with reference to the purchase of this property, did you not? A. Yes, sir.

(Testimony of Kenneth P. Schmidt.)

Q. You arrived at a situation where the promissory note executed by you, Mrs. Schmidt and the corporation would be the sole consideration. Is that right?

The Referee: Is that admitted in the pleadings?

Mr. Blanche: I think so.

The Referee: I think that is in the amended pleadings. There was a note given which was dated December 5, 1952, for \$20,000, payable on or before 90 days after date signed by Kenneth P. Schmidt Builders, Inc., by Kenneth P. Schmidt, President, and Mary W. Schmidt, and also the individual signature of Mary W. Schmidt. Go ahead.

The Witness: To answer the question, the corporation executed a note and the note was guaranteed and endorsed by Mrs. Schmidt and myself, to the best of my knowledge.

The Referee: Did you sign it individually?

The Witness: I think we guaranteed the note for the corporation.

The Referee: That is right, Kenneth P. Schmidt signed individually, as well as Mary W. Schmidt.

The Witness: Guaranteeing the corporation's note. [8]

Mr. Blanche: I object to that.

The Referee: What is that?

Mr. Blanche: I object to the use by Mr. Schmidt of the word "guaranteeing."

The Referee: There is nothing here to indicate a guarantee. They apparently signed as co-makers.

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: Mr. Schmidt is drawing a legal conclusion.

The Referee: He is doing the best he can. He is not a lawyer and he would not understand those things.

Q. (By Mr. Blanche): Who are the Board of Directors of the Kenneth P. Schmidt Builders, Inc., a California corporation?

A. Kenneth P. Schmidt and Kenneth Bohard.

Q. Kenneth who?

A. Kenneth Bohard is secretary.

The Referee: He asked for the Board of Directors. How many are there?

The Witness: Correct me if I am wrong, but I believe there are two on the Board of Directors.

The Referee: Only two on the Board of Directors?

The Witness: Yes, sir.

The Referee: Have you stated who they are?

The Witness: Yes, your Honor.

Q. (By Mr. Blanche): Who are the officers of the corporation? [9]

Mr. Cahill: The question is objected to unless it is limited as to time. The important thing would be who were the directors and who were the officers at that time. There might have been three or four or five directors or officers at that time.

Mr. Blanche: I beg your pardon.

Q. Has there been any change, Mr. Schmidt?

A. I don't recall who the directors were at that

(Testimony of Kenneth P. Schmidt.)

time. I know I was president. I don't know who the officers were. I can only guess.

The Referee: When you say at that time, are you referring to the date of December 5, 1952?

The Witness: Yes, sir.

Q. (By Mr. Blanche): Do you know who the stockholders were at that time?

A. There has been only one stockholder, and that is myself.

Q. Do you own all of the stock of the corporation? A. Yes, sir.

Q. There was a permit issued to permit you to issue certain stock to members of the Schmidt family and your children. Was that permit ever followed through or are you the sole stockholder?

The Referee: The statement of affairs prepared by Mr. Cahill and filed herein on behalf of the debtor, Subdivision 15, gives you all of that information. If you would care to [10] look at it you may do so. That may be received in evidence.

Mr. Blanche: I would like to see it.

The Referee: You may read it into evidence.

Mr. Blanche: This refers to officers but not to stockholders.

The Referee: It is supposed to. I thought it did.

Mr. Blanche: I believe that is so.

The Referee: You might have to ask him about it. I will read it into the record. In answer to Subdivision 15 in the Statement of Affairs filed September 22, 1953, where it says, "The names, titles or offices held, addresses of officers, directors and ex-

(Testimony of Kenneth P. Schmidt.)

ecutives, of each stockholder holding 25 per cent of the issued and outstanding stock of the corporation," the answer is as follows:

"Kenneth P. Schmidt, President (Acted as General Manager)"—apparently about 80 per cent stockholder, and his address is given.

"Mary Schmidt was Vice President for about one month in 1953." There is no statement about her stock interest, if any.

"Lucille Clark, Vice President." No statement about any stock interest which she may have.

"Kenneth Bohard, Secretary and Treasurer after January 5, 1953." There is no statement about any stock interest.

"Stan W. Schmidt, Secretary and Treasurer, resigned January 5, 1953." [11]

Go ahead, counsel.

Q. (By Mr. Blanche): Mr. Schmidt, do you recall whether or not Mary Schmidt was an officer of the corporation in October, 1952?

A. No. I believe the facts are just as the Judge has recited them. Mr. Cahill checked on our corporation before the report was issued. She was an officer for approximately 30 days.

Q. You will note in December she executed a note, as I understand it, on behalf of the corporation as Secretary. Is that right?

A. I do not recall.

Q. You don't know whether or not she was secretary at that time?

A. She was never secretary.

(Testimony of Kenneth P. Schmidt.)

The Referee: We have the corporate minutes. Perhaps we can save time here by looking at them.

The Witness: She was never secretary.

The Referee: Who has the corporate minutes? Do you have them, Mr. McDonnell, or does the Receiver have them?

Mr. Cahill: Mr. Chichester has them.

Mr. McDonnell: Mr. Chichester, the Receiver, has them.

The Referee: We will have them at the next hearing. We will have all of the corporate records then so that we can determine the matters with regard to the Board of [12] Directors and the stockholders.

Q. (By Mr. Blanche): Do you recall whether any meeting of the Board of Directors was had in connection with the purchase of this property?

A. There was a resolution in the records.

Q. In the corporate records there is a resolution?

A. Well, I am guessing when we had her borrow the money.

The Referee: We should have those records here and not call upon Mr. Schmidt for his recollection.

Q. (By Mr. Blanche): Do you recall of your own recollection at this time when this matter was actually presented to any of the Board of Directors?

Mr. Cahill: That would be immaterial if he recalls or doesn't recall. There is a record of it in the minute book.

The Referee: I think we will get along better if we have the records here.

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: I can furnish that information this afternoon if the Court desires it.

The Referee: I will give you an opportunity to prove it, but let's proceed as far as we can.

Mr. Blanche: Does the Court desire to continue this?

The Referee: I am ready to go on.

Mr. Blanche: I would like to go ahead at this time.

The Referee: When can you get the escrow [13] here?

Mr. Blanche: I can have it here at 2 o'clock.

The Referee: I have another calendar. I don't know how long it will take. Why not do this? If there is nothing more you can do this morning without the records why not continue it until 3 o'clock. I am pretty sure I will be ready at that time.

Mr. Cahill: It will inconvenience me. I have set appointments all during the afternoon on a matter coming before Judge Dickson.

The Referee: When could you be available?

Mr. Cahill: At any continuance, your Honor, that you make after today. I have the Newport matter coming up before Judge Dickson Monday.

Mr. Blanche: I will be glad to submit the escrow records and the corporation records for what they may be worth without the necessity of a further hearing.

The Referee: I don't think it will make a complete record. I think you had better do it the other way. Is there anything else you can cover this morning?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: Yes. Notwithstanding the corporate records, I would like to go into how the control of this corporation was handled.

The Referee: Shouldn't we get the records first?

Mr. Blanche: I don't think it is necessary.

The Referee: Very well. Try the case your own way.

Q. (By Mr. Blanche): As a matter of fact, Mr. Schmidt, [14] were you not the dominant head of the corporation for all purposes?

Mr. Cahill: Just a moment, if your Honor please. I don't know what dominant head means.

The Referee: I think it calls for a conclusion.

Mr. Blanche: This is an adverse witness.

The Referee: You can get at it in another way. You can ask what actually happened.

Q. (By Mr. Blanche): Mr. Schmidt, were there actual meetings of the Board of Directors to decide upon the purchase of properties or entering into contracts or anything of that sort, regularly held?

A. We did have a meeting on this particular property and the decisions were made by myself as president, and Kenneth Bohard, who was secretary and treasurer, and who was also general superintendent. We inspected the properties very carefully and we did have a directors' meeting on buying this particular property.

Q. Does Kenneth Bohard own any stock in the corporation? A. No, sir.

Q. He is your superintendent?

A. That is correct.

(Testimony of Kenneth P. Schmidt.)

Q. He is employed by you?

A. He was at that time.

Q. He was employed by you or by the corporation, [15] which? A. By the corporation.

The Referee: Were you the general manager of the corporation as is set forth in the Statement of Affairs?

The Witness: Yes, sir.

The Referee: Did you have the power to hire and fire employees?

The Witness: Yes, sir.

The Referee: Was Mr. Bohard under your supervision?

The Witness: Yes, sir.

The Referee: As general manager? Is the answer yes?

The Witness: Yes, sir.

Q. (By Mr. Blanche): As far as you recall, the only two persons who conferred in connection with this property were you and Mr. Bohard, is that right, as a Board of Directors?

A. No. There was one other, Lucille Clark, who was also secretary of the corporation at one time, or a director.

The Referee: What is her name again?

The Witness: Lucille Clark. She worked for the corporation as bookkeeper.

Q. (By Mr. Blanche): Did she own any stock in the corporation? A. No, sir.

The Referee: Was she hired by you?

The Witness: Yes, sir.

(Testimony of Kenneth P. Schmidt.)

The Referee: According to the Statement of Affairs she [16] was vice president at one time. Do you know how long she occupied that position?

The Witness: At least six months, your Honor.

The Referee: Between what dates?

The Witness: I don't recall the dates.

The Referee: All right, go ahead.

Q. (By Mr. Blanche): She was the secretary who acted as secretary or stenographer in the offices of the corporation, is that correct?

A. Bookkeeper.

Q. During such time she was appointed on the Board of Directors; is that right?

A. That is correct, yes.

Q. When did her employment terminate, do you have any recollection?

A. I think it was in April or May, 1953.

Q. When her employment terminated did she automatically resign as an officer and director at or about that time?

A. I don't recall. We had some financial difficulties in the corporation. I don't recall whether the resignation and the acts were turned in in the minutes or not.

Q. To all intents and purposes, as soon as she terminated she was no longer a director?

A. That is right.

Q. Or an officer? [17] A. That is right.

Q. Whether you went through the actual, specific forms of setting it up correctly on the books,

(Testimony of Kenneth P. Schmidt.)

she never acted after terminating her employment, as a director or officer? A. That is correct.

Q. Isn't it true, Mr. Schmidt, throughout all the period of time during the year 1952 and the year 1953 all the members of the Board of Directors who may have been there were there at your sufferance, they were subject to removal by you at any time?

A. That is correct I would say.

The Referee: All except your wife, but the others were your employees.

Q. (By Mr. Blanche): Their offices as directors were incidental? A. That is correct.

Q. To their other employment, is that correct?

A. Yes, sir.

Q. Their principal functions were as employees?

A. That is correct.

Q. And they occupied positions on the Board of Directors? A. Yes, sir.

Q. As you recall it, at the conclusion of the various negotiations you told Mr. McArthur that it was desired that [18] the property be taken in the name of the corporation? A. Yes.

Q. That title be held? A. Yes, sir.

Q. To the best of your recollection that is the first time that the question of the corporate identity or entity had come up? A. That is correct.

Q. In connection with your operation of the corporation it is a fact that you expended corporate moneys with reference to your own home; is that right, and subsequently transferred the home to the corporation? A. Yes, sir.

(Testimony of Kenneth P. Schmidt.)

Q. As a matter of fact, all of your personal and private business was carried on either through the corporation or individually as it might be convenient at the time; isn't that correct?

A. I don't understand that question.

Q. I think perhaps it is a little hard to understand. Did you conduct any other business personally other than what was conducted through the corporation?

Mr. Cahill: Will you fix a time, counsel?

Q. (By Mr. Blanche): During the period of the fall of 1952 and the spring of 1953, did you conduct any business individually?

A. No. The business was all in the corporation. That [19] was the only building project I had going and the only corporation.

Q. When you received a deed to this piece of property did you receive a deed from the Polikowskis on behalf of the corporation? A. Yes, sir.

Q. That was not set up on the books and records of the corporation for some reason or other. Do you know why, Mr. Schmidt?

A. I only had one girl in the office, Mrs. Clark. My records were never up to date. They were kept loosely. We had auditors, but we were short of funds. The records are in very poor shape.

Q. In your petition under Chapter XI you did not include this property as an asset of the corporation. Was that merely an oversight, is that correct?

A. I assume that is correct, yes.

Q. You had no independent recollection of that

(Testimony of Kenneth P. Schmidt.)

when you signed the schedules? A. No.

Q. Do you recall whether or not you gave your personal check to the escrow, or was it a corporate check, when you paid the escrow expenses at the Mutual Building & Loan?

A. I cannot recall. I assume it would be a corporation check.

Q. Did you do business either way? Was it your habit [20] to give a corporation check or a personal check?

A. It was a corporation check, I am pretty sure of that.

Q. Where do you reside at the present time, Mr. Schmidt? A. Newport Beach.

Q. Do you have an address there?

A. 1101 State Highway, Post Office Box 13, Balboa Island.

Mr. Blanche: That is all.

Mr. Cahill: I don't want to interfere with the order of evidence offered by counsel. I know he will want to continue with this, but I would like to ask one question so that we don't lose continuity of this thing.

The Referee: Proceed.

Cross-Examination

By Mr. Cahill:

Q. Mr. Schmidt, there has been reference to Stan Schmidt being an officer and director. Who was he?

(Testimony of Kenneth P. Schmidt.)

A. He started out as superintendent of the tract, and he was superintendent of the tract for about 30 days.

Q. Was he an officer and director?

A. Yes, he was.

Q. For how long?

A. For a very short period, I don't recall exactly.

Q. Was he an officer and director into 1952? [21]

A. You would have to refer to the records, Mr. Cahill. I don't remember.

Mr. Cahill: I have no further questions at this time.

The Referee: Mr. McDonnell, do you have any questions?

Mr. McDonnell: We will excuse Mr. Schmidt, subject to being recalled when we put on our case.

The Referee: Do you have any questions to ask at this time?

Mr. McDonnell: Not now, your Honor.

Mr. Blanche: In addition, your Honor, I would like to introduce the escrow, and I will tell counsel that the escrow instructions are signed Kenneth P. Schmidt, individually, and Kenneth P. Schmidt Builders, Inc. That is the only thing I wanted to establish by the escrow instructions, as to who the actual purchaser of this property was. Our contention in this regard is that it was Mr. Schmidt individually—not necessarily relying on the alter ego—but Mr. Schmidt was the purchaser and the Kenneth P. Schmidt Builders were purchasers, and the pur-

chasers intended to take it in one of their names, to wit, Kenneth P. Schmidt Builders, Inc. I have the actual escrow instructions, your Honor.

The Referee: Very well. Any more evidence this morning?

Mr. Blanche: No, your Honor. I merely wanted to introduce the instructions and amendments to the instructions [22] to show the signatures of the purchasers on it.

The Referee: Unless the other parties will stipulate——

Mr. Blanche: I would like to do that. I feel we could save time if I tell counsel what I have in mind.

Mr. Cahill: We can't do that. Here is the escrow and it is addressed to Kenneth P. Schmidt Builders, Inc., and its officers. We can't stipulate to that.

Mr. Blanche: No, I don't want you to stipulate to that, but I would like to introduce this without further testimony by Mr. Schmidt.

The Referee: Mr. Cahill, what is your theory of the defense to this?

Mr. Cahill: Notwithstanding these leading questions that were asked by counsel, your Honor, neither Mr. Schmidt nor his wife were in the building business at all. Mr. Schmidt was engaged in a very large building operation at the time in question, known as the Kenbo Corporation, an entirely different corporation in which he was half owner; that Kenneth P. Schmidt Builders, Inc., the debtor, was engaged in certain building activities previously——

The Referee: Do you mean the corporation?

Mr. Cahill: Yes, your Honor—and had purchased in its own behalf these lots, and pretty much as is shown in Paragraph 5 of the letter of October 5. I think the whole thing is in there. It was agreed regardless of who the purchasers were that a mortgage was to be put on, money was to [23] be borrowed on the lots and houses to be built, and out of that the seller was to be paid. If that is factually correct then the law takes over. That type of agreement is totally inconsistent with a vendor's lien. No lien can be retained under the circumstances. If there was a lien obviously the lenders would not make a first mortgage loan for the purpose. I have ample law on the subject, including a decision of the United States Supreme Court.

The Referee: You say there was a mortgage to be put on it. For whose benefit?

Mr. Cahill: For the purpose of obtaining funds to build houses—out of the mortgage loan or out of the sale of houses, to pay the seller \$20,000 for the loan.

The Referee: This mortgage wasn't for the benefit of the seller. It wasn't to secure the payment of the note.

Mr. Cahill: No. It was for the purpose of getting money to build houses. The law takes over right then and there if those are the facts.

The Referee: Isn't this more or less a legal matter? Is it denied that there was an understanding that they were to get a mortgage?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: That original letter was changed, if the Court please, and the escrow instructions—these are part of the original negotiations and it contemplated a second mortgage be taken by the Polikowskis, but it never carried through. The escrow instructions provided thereafter for the [24] purchasers to give a note.

The Referee: We will have to take evidence on that.

Mr. Cahill: I think so, your Honor.

The Referee: I guess so.

Mr. Blanche: The escrow instructions will speak for themselves, if the Court please.

The Referee: We will have to see what they show. Now we have the question of when we should continue this. How are you fixed, Mr. Cahill?

Mr. Cahill: Any time after Monday, your Honor, unless the Newport case should go into an extended hearing.

(Discussion held off the record in re continuance.)

The Referee: I will continue this matter until the 25th at 11 o'clock.

(Whereupon the matter was continued to November 25, 1953, at 10 o'clock a.m.) [25]

CERTIFICATE

I, Byron Oyler, hereby certify that on the 19th day of November, 1953, I attended and reported, as official court reporter, the proceedings in the

above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 10th day of February, 1954.

/s/ BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed February 12, 1954. [26] Referee.

November 25, 1953, 11:00 A.M.

The Referee: Are you ready to proceed?

Mr. Blanche: Yes, your Honor.

The Referee: Call your first witness.

Mr. Blanche: I will call Mr. Lynn to the stand.

PHILIP E. LYNN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Blanche:

Q. Will you state your full name?

A. Philip E. Lynn.

(Page One)
ESCROW INSTRUCTIONS
BUYER

110

October 30, 1952

TO MUTUAL SAVINGS AND LOAN ASSOCIATION

Kenneth P. Schmidt Builders, Inc. will hand you a trust deed and note for \$20,000.00, as described below

MEMO	
Paid outside of Escrow	
Cash through Escrow	
Encumbrances of Record	
New Encumbrances	\$0,000.00
Total Consideration	\$20,000.00

and any additional funds and documents, required from me to enable you to comply with these instructions, which you are authorized to see with or deliver provided on or before November 30, 1952, instruments have been filed for record enabling you to proceed.

Title Insurance and Trust Company Standard Owner's or Joint Protection policy of title insurance, with this company liability for the amount of total consideration on real property in the County of Los Angeles, State of California, via

A portion of Lot 1 of Tract 1032

FILED
 OCT 25 1952
 EXHIBIT No. 3
 (Notarized)

as per map recorded in Book 17 Page 142-3 of Maps
 County, showing title vested in KENNETH P. SCHMIDT BUILDERS, INC. a corporation

Free of encumbrances except All General and Special Taxes for the fiscal year 1952, 1953, including PERSONAL PROPERTY TAXES of any former owner, AND ALSO INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENT OF WHICH IS INCLUDED THEREIN AND COLLECTED THEREWITH; all taxes and assessments levied or assessed subsequent to date of these instructions; conditions, restrictions, reservations, covenants, rights, rights of way, easements and the exception of water on or under said land, now of record, if any;

Mortgage or Trust Deed securing an indebtedness in favor of NONE
 as per its terms, now of record, Beneficiary's statement to show an unpaid balance of principal of \$ NONE but if same should show to be more or less than said amount, then you are to keep the total consideration the same as shown above, by adjusting the cash through escrow

TRUST DEED on your usual form } in favor of CLARENCE E. POLIKOWSKY and WINIFRED POLIKOWSKY, his wife, as joint tenants.
 securing note of \$ 20,000.00, dated October 30, 1952, all due April 30, 1953, or six months from close of escrow, whichever date is sooner.

payable at _____ with interest from _____ at the rate of X percent
 per annum, payable _____ principal and interest payable \$X _____ or more on the X day of each
X month, beginning on the _____ day of X 19____
 Interest @ 6% per annum payable from November 30, 1953, or the close of escrow, whichever date is sooner.
 Note shall be signed by the vestee corporation, and by Kenneth P. Schmidt, personally.

Buyer agrees to pay all buyers costs, and all sellers costs to the extent of \$150.00. Any sellers costs in excess of \$150.00 are to be charged to the seller.

It is understood that the above trust deed will be subordinated to the lien of all construction loans made by any savings and loan association, made by the buyer for the construction of improvements on property. Subordination agreement to be incorporated in deed of trust when recorded.

- The completion of this escrow is contingent upon the following:
1. The approval of the legal description of subject property and the preliminary title report by buyer.
 2. The approval by the buyer and seller of a release clause to be incorporated in the above trust deed.
 3. The acceptance by the seller of the bond or bonds put up by the buyer to guarantee the completion of the street and utility improvements on property.

At the close of escrow you are instructed to forward to the dec Arthur _____, copies of buyers and sellers closing statements.

Taxes (including all items appearing on tax receipt) taxes on personal property not converted through exchange. **Table D** based on latest tax statement in your possession. **Remarks** no basis adjustment furnished by seller and proposed by us. **Table D** but make no adjustment in deferred capital.

I agree to pay on demand all present and future charges to be made by the mortgagee for recording deed, for plat fees on documents submitted for mortgage release or otherwise, for drawing mortgage and trust deed, cost of drawing and recording any other document, not to my part to complete this release. Title Company's charge, if any, for showing title vested in me, and Muser's attorney fee as charged.

The seller guarantees that the premium on any loan or policy which he hands you or causes to be handed you in this escrow has been paid in full and that said policy has not been hypothecated.

If the conditions of this escrow have not been complied with at the time herein provided, ~~you are nevertheless~~ to complete the same as soon as the conditions except as aforesaid have been complied with, unless I shall have made written demand upon you for the return of money and/or insurance.

NOTICE, DEMAND OF CHANGE OF INSTRUCTIONS SHALL BE OF ANY EFFECT IN THIS SCROW UNLESS GIVEN IN WRITING BY ALL PARTIES AFFECTED THEREBY. In the event conflicting demands are made or notices served upon you with respect to this scrow, the parties hereto agree that you shall have the absolute right to elect to act in either or both of the following ways: (1) to withdraw from the proceedings in, and performance of, this scrow or file a suit in interpleader and demand order from the court requesting that the parties to interplead and litigate in such court their several claims and rights amongst themselves. In the event such interpleader suit is brought, you shall upon facts be fully released and discharged from all obligations to further perform any and all duties or obligations imposed upon you in this scrow; and the parties jointly and severally agree to pay you all costs, expenses, and reasonable attorney's fees expended or incurred by you, the scrow shall be dissolved and a judgment thereon to be rendered by the court in such suit.

You are not to be held liable for the sufficiency or correctness as to form, manner of execution, or validity of any instrument deposited in this service, nor as to identity, authority, or rights of any person executing the same, nor for failure to comply with any of the provisions of any agreement or other instrument filed herein or referred to herein, and your duties hereunder shall be limited to the safekeeping of such money, instruments, or other documents received by you as escrow holder, and for the disposition of same in accordance with the written instructions agreed to by the parties.

All parties herein further agree, jointly and severally, to pay on demand, as well as to indemnify and hold you harmless from and against all costs, damages, judgments, attorney's fees, expenses, obligations and liabilities of any kind or nature which, in good faith, you may incur or sustain in connection with or arising out of this escrow, and you are hereby given a lien upon all the rights, titles and interest of each of the undersigned in all escrowed papers and other property and monies deposited in this escrow, to protect your rights and to indemnify and reimburse you under this agreement.

It is agreed by the parties hereto that so long as your rights and liabilities are involved, this transaction is an escrow and not any other legal relation and you are an escrow holder only on the foregoing expressed terms and you shall have no responsibility or liability to me or any one of the parties in this escrow of any note, receipt, loan, advance or other transaction involving any property herein described or of any profit realized by any person, firm or corporation from the sale and disposal of this and/or any other escrow included in connection therewith regardless of the fact that such transaction could be handled by you in this escrow or in another escrow.

Any amended, supplemental or additional instructions given shall be subject to the foregoing conditions.

THE FOREGOING TERMS, CONDITIONS, PROVISIONS AND INSTRUCTIONS HAVE BEEN READ AND ARE UNDERSTOOD AND AGREED TO BY EACH OF THE UNDERSIGNED:

Signature *[Signature]* Address *Robert P. Schmitt* Phone *AT 44110*
513 S. Atlantic Blvd.
Monterey Park, California

Signature *[Signature]* Address *[Signature]* Phone *[Signature]*

SELLER

October 30

19 52

THE FOREGOING TERMS, CONDITIONS AND/OR INSTRUCTIONS ARE HEREBY CONSIDERED IN APPROVED AND ACCEPTED. I will hold you all instruments and money necessary of me to enable you to comply therewith, including a deed of the property described executed by ELMER C. LIPOWY and IRLAED LIPOWY, his wife,

which you are authorized to use and to deliver when you hold in this capacity for the account of
the printer

The sum of \$ 0.00 and any prorata adjustments and instruments deliverable to me under these instructions. Pay at the close of
 my now any encumbrances necessary to place title in the condition called for under these instructions, the portion of prorata adjustments and the fol-
 lowing:

any commission of \$ 100.00 to W. M. Duncan, whose address is 44 N. Marquette Avenue, Pasadena, California, and commission of \$100.00 to the Mac Arthur Smith, 44 N. Marquette Avenue, Pasadena, California, shall be in the form of check and cash on order of said brokers executed by the sellers. Said commission shall be deposited in a bank account to the payees named therein at the close of each day. The check, cash, and bank deposit shall be made in the form of a check, cash, and bank deposit, and shall be made in the form of a check, cash, and bank deposit.

[illegible]

\$ 70.190 The IP amount - net the charges amount to be added to the total amount due at discharge.

Issue your check to _____
 Credit balance to _____

[Faint handwritten notes at the bottom of the page]

(Testimony of Philip E. Lynn.)

Q. (By Mr. Blanche): There are amended instructions dated December 5, is that right?

A. Yes.

Q. Did you also make a photostatic copy of those? A. Yes.

Mr. Blanche: I will offer the amended instructions dated December 5 as Petitioner's Exhibit 4.

(The documents were marked as one exhibit, Petitioner's Exhibit 4.)

PETITIONER'S EXHIBIT No. 4

(Filed Nov. 25, 1953)

Amended Instructions

December 5, 1952.

Mutual Savings and Loan Association,
315 East Colorado Street,
Pasadena 1, California.

Gentlemen:

Re: Escrow No. 0-4830

My instructions in this escrow are amended and/or supplemented in the following particulars only:

All references to the trust deed and note for \$20,000.00 are deleted.

The reference to the subordination of the trust deed to the construction loans is deleted.

The items 1, 2, and 3 upon which the completion of the escrow is contingent upon are deleted.

In lieu thereof the Kenneth P. Schmidt Builders, Inc., a California corporation, will hand you an

(Testimony of Philip E. Lynn.)

unsecured promissory note for \$20,000.00 in favor of Clarence E. Polikowsky and Winnifred Polikowsky, his wife, as joint tenants, dated December 5, 1952, payable on or before 190 days from date, with interest at 6% per annum payable at maturity. Said note shall also be executed by Kenneth P. Schmidt and Mary W. Schmidt individually. Endorse interest on said note to the close of escrow.

Deliver the note to the payees named therein, at the close of escrow.

KENNETH P. SCHMIDT
BUILDERS, INC.

By /s/ CLARENCE E. POLIKOWSKY.

By /s/ WINNIFRED POLIKOWSKY.

KENNETH P. SCHMIDT,

/s/ KENNETH P. SCHMIDT.

MARY W. SCHMIDT,

/s/ MARY W. SCHMIDT.

Mr. Blanche: This is a photostatic copy, Mr. Cahill, the original being here and it is being stipulated that it may be introduced in lieu of the original.

Mr. Cahill: So stipulated.

The Referee: Anything further?

Mr. Blanche: You may inquire. [4]

Mr. McDonnell: I have a few questions.

Cross-Examination

By Mr. McDonnell:

Q. First of all, let me ask if there were any other changes in the escrow instructions other than

(Testimony of Philip E. Lynn.)

the one you have shown us and which we have offered in evidence?

A. There were some other amended instructions.

Q. Do you have them in the file with you?

A. But it did not basically change it, I guess.

Q. May I see them?

A. Yes. Here they are (indicating).

Q. These instructions cover a development about the recordation of the deed?

A. That is correct.

Q. They do not affect the consideration in any way? A. No.

Q. Mr. Lynn, did you personally handle this transaction? A. Yes, I did.

Q. From its outset, from the original instructions and everything forward?

A. That is right.

Q. Who first came into your office in connection with these instructions?

A. The agent, the McArthur Company. [5]

Q. Did Mr. Schmidt come in at that time?

A. No. Mr. Schmidt came in later.

Q. At that time when he came in later on was that when he signed the escrow instructions?

A. Yes.

Q. When he came in who was present besides Mr. Schmidt and yourself, anybody else?

A. Not that I recall.

Q. I note that the first amendment to the escrow instructions delete the requirement of a trust deed. When was that change first brought to your atten-

(Testimony of Philip E. Lynn.)

tion? Was that the time you got the amendment?

A. The day the amendment was made, yes.

Q. Did some one come in to see you about it?

A. All of the parties to the escrow were in the office at that time.

Q. The Polikowskis? A. I believe so.

Q. And Mr. Schmidt? A. I believe so.

Q. Was there a discussion about the change to be made in the escrow instructions at that time?

The Referee: Are you trying to go behind the terms of this written contract?

Mr. McDonnell: No, your Honor.

The Referee: Unless there is some ambiguity, you are [6] not entitled to go into oral conversations that took place regarding this written document.

Mr. McDonnell: I am not permitted to put in evidence which would vary the terms of a written document.

The Referee: All right.

Mr. McDonnell: I am not trying to do that.

The Referee: What are you attempting to do?

Mr. McDonnell: I want to establish what the conversation was as to the reason for the change being made. It may be a pertinent factor in this litigation.

Mr. Blanche: I will object to that.

The Referee: Objection sustained.

Mr. McDonnell: Then may I make this offer of proof, your Honor? Frankly I haven't had an opportunity to interrogate and examine this witness, but it is our contention that there was a definite

(Testimony of Philip E. Lynn.)

purpose in removing the requirement of the trust deed, and I will offer to prove by this witness and by Mr. Schmidt that the purpose of making the change was to permit the placing of other encumbrances on this property, and as Mr. Cahill indicated that will form the basis of the legal argument in this case.

Mr. Blanche: I think it is entirely irrelevant. There is no contention that any encumbrances were placed on there. I think that would be a good defense as to any subsequent encumbrances put on there or purchases for value without [7] notice. I think the escrow instructions speak for themselves.

Mr. McDonnell: We are prepared to cite cases.

The Referee: I would like to hear them.

Mr. McDonnell: We are prepared to cite cases which we believe establish the law on this point.

The Referee: I know those cases. I have examined them myself, but the question is whether you can show some oral understanding in addition to this agreement. Here is a definite agreement between the parties.

Mr. McDonnell: That is correct, and we are not attempting to vary or change it one jot or tittle.

The Referee: You are attempting to introduce some oral transaction in addition to what you claim is a complete contract.

Mr. McDonnell: No, we are not, if your Honor please. This does not affect the contract at all. The parties may have a number of reasons for acting in a certain fashion.

(Testimony of Philip E. Lynn.)

The Referee: It is not a reason. It is a question of whether they agreed to do certain things. They claim they agreed to do certain things. The things you claim are not contained in these escrow instructions signed by all parties.

Under the circumstances and under the parol evidence rule of California oral testimony cannot be received to show a different intent or a different reason [8] or a different idea of the parties to this contract than what is expressed on the face of the instrument. You may proceed.

Mr. Blanche: That is all, your Honor.

Mr. Cahill: I have no questions.

The Referee: You are excused, Mr. Lynn. Call your next witness.

Mr. Blanche: I think the only other thing was the thought of having the minute books in order to determine who the officers and directors were.

The Referee: Is that important here?

Mr. Blanche: I don't think it is very important. I think the testimony is clear enough in the first place. The Court, however, did suggest that we have the minute books because that would be the best evidence, but I don't believe they are really necessary at this time.

The Referee: I don't think the matters relating to corporate officers, stockholders and directors are important. It is already established who they were. Mr. Cahill can give us that information. Do you rest?

Mr. Blanche: I rest.

The Referee: What about you gentlemen?

Mr. McDonnell: I would like to call Mr. Schmidt.

The Referee: Upon what theory? If you can show me some authority whereby I can let it in, I will hear you.

(Citation of cases and argument omitted at this point.) [9]

Mr. McDonnell: I would like to put Mr. Schmidt on the stand and make an offer of proof so that I have a complete record.

The Referee: You don't have to do it that way, Mr. McDonnell. Make your offer of proof.

Mr. McDonnell: I just wanted to call him to the stand.

Mr. Cahill: Ask him a few questions because they may be acceptable all the way around.

The Referee: Make your offer of proof and I will rule on it.

Mr. McDonnell: I will ask that Mr. Schmidt be sworn.

(Kenneth P. Schmidt sworn.)

Mr. McDonnell: I would like to make the following offer of proof: I propose to show by the testimony from Mr. Schmidt that the agreement between Mr. Schmidt and the Polikowskis—not the agreement, but the intent of the making of the agreement whereby title was transferred in exchange for a promissory note, was to permit Kenneth P. Schmidt Builders, Inc., who we allege to be the purchaser, to encumber the property with a trust deed or other

encumbrance so as to enable them to pay off the vendors of the property, the Polikowskis. That is the offer of proof.

The Referee: Do you offer to prove that by any written instrument? [10]

Mr. McDonnell: There is no written record outside of the letter which indicates that which I think is marked Petitioner's Exhibit No. 1 in evidence. I think that indicates there was some intent between the parties.

The Referee: Let's be clear about that. I don't remember anything about that.

Mr. McDonnell: There is a lengthy letter in the file, if the Court please.

The Referee: Let me get it.

Mr. Cahill: It is Paragraph 5.

Mr. Blanche: I have another copy of the letter.

The Referee: This letter antecedes these two exhibits, 3 and 4.

Mr. Blanche: That is correct.

The Referee: Why isn't that letter merged in these contracts?

Mr. Blanche: It is.

The Referee: Let me see the letter.

Mr. Blanche: I am sorry. I introduced it.

Mr. Cahill: It is Paragraph 5, your Honor.

The Referee: Do you have a copy of it?

Mr. Cahill: No.

The Referee: I have sent for it.

Mr. Blanche: With reference to the offer of proof, your Honor, I will object to it. The question of this letter, there is no question but what the

letter provided [11] originally that the purchasers would take back a second trust deed and permit Mr. Schmidt to place liens on it. That was later changed. The original escrow instructions provided for that. That was later changed. We introduced the letter to show who Mr. Polikowski thought he was doing business with.

Mr. McDonnell: The purpose of making the offer of proof is to show why the change was made.

The Referee: Your offer is solely based on something that happened before the contract was signed by the parties, to show that they had something different in mind than what is shown in the contract.

Mr. Blanche: That is right.

Mr. McDonnell: No.

The Referee: Under the California Parol Evidence Rule you have to show first it was either ambiguous or uncertain or was obtained under fraud or duress before you can open up and go back to conversations between the parties and try to show something different than is expressed in writing.

Mr. McDonnell: So that the record will be clear, my purpose in making the offer of proof is not to show any difference in the terms of the contract between that which constitutes the amended instructions.

The Referee: You are trying to add something to it that isn't there. [12]

Mr. McDonnell: I am not attempting to add something. I am attempting to show something completely outside of the matter.

The Referee: You are trying to add something to the contract.

Mr. McDonnell: No, I am not.

The Referee: You are trying to show that they had some kind of an agreement that Mr. Schmidt could put liens on the property without the objection of the vendor. That is what you are trying to do.

Mr. McDonnell: I will offer authorities on the point as to whether or not I can offer evidence. Does your Honor wish me to do that, or do you want to handle it in an oral fashion?

The Referee: I asked for authorities in the beginning. You didn't want to do it. You went ahead and made your offer of proof. Of course, I am glad to have authorities on all matters involved here. No judge knows all of the law. I think I made my position clear. If you can show me anything which will give you a right to show that there was some arrangement in addition to this or contrary to it by oral conversation between the parties prior to making this instrument, I would like to see them.

Mr. McDonnell: I will see if I can do so, your Honor. I have made my record.

The Referee: Do you want to submit this on briefs? [13]

Mr. Cahill: From my viewpoint, your Honor, I hardly think it is necessary. The reason I don't think it is necessary is because in the writings themselves under the cases, the cases resolve right in the writings.

The Referee: There is one case here that supports the position. Apparently it supports the posi-

tion that the signatures of Mr. and Mrs. Schmidt constituted a security, therefore the vendor's lien was waived. The other cases don't go to that effect.

Mr. Cahill: If I may interrupt your Honor, yesterday we tried to find a case. It is 10 Cal. App. 2d 555. Is your Honor familiar with that case?

The Referee: Yes.

Mr. Cahill: If your Honor will let me have the original escrow instructions I will call your attention to the important wording.

The Referee: The original instructions were amended.

Mr. Cahill: In one particular.

The Referee: They were amended so that the trust deed was not to be given.

Mr. Cahill: That is all right. The wording I direct your Honor's attention to, in light of the decisions, is this: "Free of all encumbrances"—I had better read back a little bit—"showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation, free of all encumbrances except all general and special taxes," and so forth. That [14] case holds that where you use those words it precludes any hope of a retained vendor's lien.

The Referee: That is right. What about that?

Mr. Blanche: I have a case in point on that from the Supreme Court of the United States.

The Referee: But the California law applies here, not the Supreme Court of the United States.

Mr. Blanche: It is the same thing here, if the Court please.

The Referee: Mr. Cahill pointed out something

I had not noticed before. These original escrow instructions provide that title be vested in the Debtor corporation free of encumbrances except for certain taxes and so forth.

The decision of the Supreme Court in a case like that must have come from some other state, not California.

Mr. Blanche: This particular case, I believe, came from Colorado.

The Referee: We have to go by the California law here.

Mr. Blanche: I read that case, your Honor. I checked that point. I would like permission to cite authorities in that regard.

The Referee: I think authorities ought to be filed.

Mr. Blanche: Also I would like to cite to the Court one case——

The Referee: You may cite that in your authorities. That is the best way to handle it. [15]

Mr. Blanche: It is the only case in the United States that I have been able to find.

The Referee: Cite it in your authorities. How long do you want, ten, ten and five?

Mr. Blanche: That will be all right. May I lead off?

The Referee: You are the Petitioner. I think perhaps you should.

Mr. Cahill: Ten, ten and five, is quite satisfactory.

Mr. McDonnell: Shall I bring up my points in my brief?

The Referee: Yes. If I am wrong I would like to know it. [16]

I, Byron Oyler, Official Court Reporter, do hereby certify that the foregoing sixteen (16) pages comprise a true and correct transcript of the proceedings had in the above-entitled matter.

Dated this 11th day of January, 1954.

/s/ BYRON OYLER,
Official Reporter.

[Endorsed]: Filed January 13, 1954. Referee.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 57,338-HW

In the Matter of:

KENNETH P. SCHMIDT BUILDERS, INC.,
Bankrupt.

REPORTER'S TRANSCRIPT OF REHEARING
ON PETITION TO HAVE VENDOR'S
LIEN DECLARED ON CERTAIN REAL
PROPERTY IN PASADENA

Appearances:

For the Petitioners:

JOHN K. BLANCHE, ESQ.

For the Trustee:

C. E. H. McDONNELL, ESQ.

For the Bankrupt:

L. M. CAHILL, ESQ.

Thursday, March 4, 1954, 10 A.M.

The Referee: Kenneth P. Schmidt Builders, Inc.

Mr. McDonnell: That is ready, your Honor.

The Referee: Go ahead.

Mr. McDonnell: This is a reopened hearing that the Court has reopened on its own motion for the purpose of taking certain testimony from Mr. Schmidt——

The Referee: It is for the purpose of taking any testimony either side will want that is relevant and competent.

Mr. McDonnell: Very well, your Honor. I would like to call Mr. Schmidt.

KENNETH P. SCHMIDT

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. McDonnell:

Q. Your name is Kenneth P. Schmidt?

A. Yes, sir.

Q. And you are at present president of the bankrupt corporation, Kenneth P. Schmidt Builders, Inc.?

A. Yes, sir.

Q. Were you president during the year 1952?

A. Yes, sir.

Q. You testified here before, Mr. Schmidt, concerning [2*] a certain transaction in which a parcel of real property was purchased from Winnifred

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Kenneth P. Schmidt.)

and I think it is Alfred—no, Clarence E. Polikowsky. May I have the exhibits, your Honor?

The Referee: Yes, here they are.

Q. (By Mr. McDonnell): Now, I am first going to show you, Mr. Schmidt, that which is Petitioners' Exhibit 3 in evidence, a set of escrow instructions dated October 30, 1952. I believe you previously testified you have seen those; is that correct?

A. Yes.

Q. Now, I call to your attention the fact that on those escrow instructions there is a provision which states that the buyers are going to give in favor of Clarence E. and Winnifred Poliskowsky a trust deed; and quoting from the escrow instructions: "On your usual form, securing note of \$20,000, dated October 30, 1952, all due April 30, 1953, or six months from close of escrow, whichever date is sooner."

You see that provision, do you?

A. Yes, sir.

Q. Now, I call your attention to Petitioners' Exhibit 4, which is a letter or letter form headed "Amended Instructions," and I call to your attention that that provides in part, "All references to the trust deed and note for \$20,000 are deleted."

With that before you, Mr. Schmidt, I want to ask you [3] this question: What was the—let me rephrase it this way: Can you tell us—answer yes or no—why the provision for the trust deed was deleted from the second escrow, that is from the escrow instructions, can you tell us?

(Testimony of Kenneth P. Schmidt.)

Mr. Blanche: To which I object. It calls purely for a conclusion.

The Referee: No, he is calling for a fact. I want this hearing confined within the limits of the cases I mentioned in my order for reopening.

Mr. Blanche: If there was an agreement, some conversation, that is one thing, but——

The Referee: I think the best way to do is let him answer and then you can move to strike it if it is not within the limits of the cases I cited. We don't know what the testimony will be.

Mr. McDonnell: I merely asked him for a yes or no answer.

The Witness: Would you restate it, please?

(Record read as follows: "Q. Can you tell us—answer yes or no—why the provision for the trust deed was deleted from the second escrow, that is from the escrow instructions, can you tell us?")

The Witness: Yes.

Q. (By Mr. McDonnell): Now, was there some conversation concerning that change? Answer yes or no. [4]

The Referee: With whom?

Mr. McDonnell: Well, I will build the foundation.

The Witness: Yes.

Q. (By Mr. McDonnell): And with whom was the conversation and where did it take place?

A. It took place with the broker over the telephone, and then with the escrow agent, Mr. Lynn,

(Testimony of Kenneth P. Schmidt.)

at the Mutual Loan & Savings Escrow Department.

Q. To whom do you have reference when you say with the broker? Do you know the broker's name?

A. Mr. MacArthur, Jr., and Paul Duncan, who was a salesman in Mr. MacArthur's office.

Q. Do you recall with whom you actually had that conversation?

A. It was discussed with both parties.

Q. Was it discussed on more than one occasion?

A. I don't recall. I know we discussed it over the telephone with Mr. Duncan and then Mr. MacArthur, explaining why we wanted to amend the escrow instructions.

Q. And how long before the escrow instructions were amended did this conversation take place?

The Referee: The original or amended?

Mr. McDonnell: The amended, about how long before that?

The Witness: Oh, I would say a couple of weeks, to the best of my memory. [5]

Q. (By Mr. McDonnell): Now, can you give us the sum and substance of that conversation that you had?

Mr. Blanche: To which I am going to object on three grounds. First, it would have to be shown that the agent had the authority or that this was communicated to the principal. Apparently there was no conversation had with Mr. or Mrs. Polikowsky. The conversation with the broker might be an entirely different thing.

(Testimony of Kenneth P. Schmidt.)

In the second place, while I will grant the authorities cited by the Court in connection with this particular transaction, that if there are other and further things which go beyond the actual written contract, that those can be brought in by parol evidence, nevertheless I have a case here in California which is very clear on this identical point, that a man does and cannot waive his vendor's lien until he gets it.

Now, in the particular case that I have, the——

The Referee: Have you got the citation?

Mr. Blanche: I have the case right here, your Honor.

The Referee: Is it a Federal case?

Mr. Blanche: No, it is a California case, a Pacific case.

The Referee: Oh, you have the Pacific Reporter there?

Mr. Blanche: Yes.

(Argument and discussion between the Court and counsel.)

The Referee: Now, what I want to know and I think I am [6] entitled to know under these cases is why they didn't stick to the original escrow instructions and why they had amended escrow instructions of an entirely different nature. That will help me interpret the intent of the parties to the agreement. I think that is perfectly consistent with these California cases that I have cited to you.

Now then, if any of this testimony tends to vary or contradict any of the terms of the amended in-

(Testimony of Kenneth P. Schmidt.)

structions or the original instructions that were not amended, I think that is out of order and you are entitled to object. But if they are entirely consistent, as stated here in these cases, with the original or amended instructions, then I think it is proper.

Mr. Blanche: Well, may I point out that in this case the offer of proof——

The Referee: You mean what was done before?

Mr. Blanche: Well, I gather that this is in connection with the offer of proof made by Mr. McDonnell.

The Referee: No, that is out. I ruled wrong on that and I am reopening the case and counsel can produce any evidence in line with these cases to show what the intent of the parties was in making those changes. I think I have to receive it.

Mr. Blanche: Basically Mr. McDonnell said: "I propose to show by the testimony from Mr. Schmidt that the agreement between Mr. Schmidt and the Polikowskys—not the [7] agreement, but the intent of the making of the agreement whereby title was transferred in exchange for a promissory note, was to permit Kenneth P. Schmidt Builders, Inc., who we allege to be the purchaser, to encumber the property with a trust deed or other encumbrance so as to enable them to pay off the vendors of the property, the Polikowskys."

Now, that is in my opinion an amplification of the agreement. Now, if it merely goes to the intent in making the agreement, I don't see how the intent can be charged to the Polikowskys unless they know about it.

(Testimony of Kenneth P. Schmidt.)

The Referee: I know, but the knowledge of the agent is knowledge of the principal. If you permit an agent to go out and negotiate a sale of your property and then he comes to you with an agreement, you are bound by what he does.

Mr. Blanche: An authority to negotiate a sale of real property must have been in writing.

The Referee: Are you repudiating these brokers?

Mr. Blanche: Not their right to negotiate a sale at all.

The Referee: Then if they had a right to negotiate a sale then we have a right to know what the negotiations were that led up to the agreement. There must have been some reason to change from the original to the amended escrow instructions. I think the Court is entitled to know what that reason [8] was.

Mr. Blanche: May it go in subject to my objection?

The Referee: Certainly. You can do it that way, or when it is all in you can move to strike it.

Mr. Blanche: Very well.

Mr. McDonnell: Before we go forward, apparently the agency of the MacArthur Company is going to be a factor in this case, and we have not gone into that. Does the Court wish me to go into the negotiations with Mr. Schmidt—

The Referee: Mr. McDonnell, you are trying the case. It is up to you.

Mr. McDonnell: All right.

(Testimony of Kenneth P. Schmidt.)

Q. I will put the question to you again. Mr. Schmidt, you have told us about some conversations you had with I think Mr. MacArthur, Jr., and someone else. Can you tell us what the substance of those conversations was?

A. I asked them if they would contact the owner of the property for the purpose of amending the original escrow instructions. I would like to have title delivered to Kenneth P. Schmidt Builders, Inc., because the corporation was at the time active in developing houses in Monterey Park. So it would be better for us to develop their property under the building company, Kenneth P. Schmidt Builders, Inc., and for the purpose of borrowing money to build the nine or ten houses on the Polikowsky property, it would be necessary for them to either take back a second trust deed and subordinate themselves to a first trust deed, which I would have [9] to put of record in favor of the corporation, but it would be more desirable if they would give the corporation clear title to the property and for security and collateral take back a promissory note executed by Mrs. Schmidt and myself.

Q. That was the conversation after the first——

A. That was my request.

Q. And what did they say?

A. Mr. MacArthur, or the MacArthur Company, said they understood the request, why I wanted it, and they would contact the owners of the property to see if it was possible. A period of time passed and——

(Testimony of Kenneth P. Schmidt.)

Q. Then did you have another conversation with him?

The Referee: Just a minute. He said time passed, then what?

The Witness: A period of time passed and the MacArthur Company notified me that the request was acceptable and they were preparing the amendments, and they were prepared and executed.

Q. (By Mr. McDonnell): Do you know who called you the second time or who you talked with the second time?

A. All my conversations were carried out with either Mr. MacArthur, Jr., or Mr. Duncan. I honestly can't tell you which it was.

Q. Now, I want to go into the question of the course of the negotiations. Did you first contact the Polikowskys or MacArthur Company or did they contact you about that [10] property?

A. I never met the Polikowskys, nor would I know them if I saw them. The property was submitted to me by Paul Duncan of the MacArthur Company.

Mr. Blanche: Just for the record, that is William Duncan?

The Witness: Excuse me, William Duncan.

Q. (By Mr. McDonnell): And was it with Mr. Duncan that you negotiated after that time?

A. Yes, he, and eventually Mr. MacArthur, Jr., was brought into the negotiations.

Q. And at the time of the first escrow instructions were you still negotiating with those two gen-

(Testimony of Kenneth P. Schmidt.)

lemen, either or both of them? A. Yes, sir.

Q. And you testified you have never had any contact with the Polikowskys? A. No, sir.

Q. Mr. Schmidt, during these conversations that you had with Mr. MacArthur and Mr. Duncan, was there any discussion as to the amount of the first trust deed loan you intended to put on the property?

A. Yes, sir.

Q. Did you name any particular figure?

A. Yes, sir.

Q. What was that? [11]

A. I told them that the Mutual Savings & Loan where we had the escrow opened had given me a verbal commitment to finance the homes, and I would borrow in the neighborhood of \$11,000 to \$12,500, construction loans, which would be around \$100,000 for the purpose of building the homes.

Mr. McDonnell: I think that is all the questions I have.

Cross-Examination

By Mr. Blanche:

Q. You never placed a trust deed on the property? A. No, sir.

Q. In favor of the Mutual Building & Loan?

A. No, sir.

Q. There is no one who loaned any money on the property on the strength or security of your title; is that correct? A. No, sir.

Q. Did you ever include this title to the Polikowsky property in any of your financial state-

(Testimony of Kenneth P. Schmidt.)

ments that you made to creditors or anybody?

The Referee: What do you mean, he personally or the corporation?

Mr. Blanche: On behalf of the corporation.

Mr. McDonnell: Just a moment. I am going to object to that. That assumes he made financial statements after the purchase of the property. There is no showing of that [12] here.

The Referee: No, I will overrule the objection.

The Witness: Not to my knowledge, sir. I would say that with reservations, but not to my knowledge. All I did was spend several thousand dollars engineering the map, and it is ready to record, the subdivision, but was never encumbered or to my knowledge used as an asset in the corporation.

Q. (By Mr. Blanche): As a matter of fact, it was not included on the books of the corporation, was it? A. Entered as an asset?

Q. Yes.

A. Well, I had nothing to do with the books. I really do not know.

Q. Now, did you tell Mr.—

The Referee: Wait a minute. It was listed in your schedules as an asset, wasn't it?

Mr. Blanche: Not at first.

The Referee: Mr. Cahill, wasn't it listed in the schedules as an asset?

Mr. Cahill: Not in the original schedules because I did not have the books.

The Referee: Did you ever file an amended schedule?

(Testimony of Kenneth P. Schmidt.)

Mr. Cahill: Yes, I think we did in some way on that. I am not clear on that.

The Referee: Did your amended schedules include this [13] property?

Mr. Cahill: That I do not recall, your Honor, and I do not have that file here this morning.

Mr. Blanche: I think the first time that it came to Mr. Cahill's attention, was when we began to press concerning the payment of the promissory note and the vendor's lien.

The Referee: There is no question but what title was transferred to this corporation?

Mr. Blanche: No, but my point is of course there was no estoppel on anybody's part, because no one ever depended on the title to this property being in the name of the corporation. Also, I believe it goes to the question of the alter ego as well.

The Referee: Well, after the title was conveyed to Kenneth P. Schmidt Builders, Inc., it was never thereafter transferred to anyone else by the Kenneth P. Schmidt Builders, Inc., was it?

The Witness: No, sir, nor was it encumbered.

The Referee: The next question, please.

Q. (By Mr. Blanche): Did you tell Mr. MacArthur that you were the sole owner of the corporation?

A. I do not recall. I don't remember any such conversation.

Q. Would you state that you did not tell him that you were the sole owner of the [14] corpora-

(Testimony of Kenneth P. Schmidt.)

tion? A. No, I wouldn't say that either.

The Referee: Do you recall any conversation along that line with any of the people connected with this matter?

The Witness: No, sir.

Q. (By Mr. Blanche): Well, when you talked about placing the property in the name of the corporation for the purpose of doing this building and signing a note, wasn't there something said about that at that time, that you were the sole owner of the corporation?

A. I don't recall. I don't recall any such conversation.

Q. You saw some of the letters that were sent by Mr. MacArthur to the Polikowskys?

A. Yes, sir.

Q. Do you recall having seen this letter of October 24, 1952?

A. Why, I cannot recall seeing this letter, I had several letters from Mr. MacArthur directed to me, but I can't say that I read a copy of this.

Mr. McDonnell: Well, counsel, have you made it clear that this is not that type of letter that Mr. Schmidt is referring to, that is not one sent to him? You are not contending this letter was sent to Mr. Schmidt, are you?

The Referee: No, but the question was does he recall seeing this letter.

The Witness: I do not recall seeing this [15] letter.

Q. (By Mr. Blanche): He sent you copies on

(Testimony of Kenneth P. Schmidt.)

occasion of letters he sent to Mr. and Mrs. Polikowsky, did he not, or you saw the letters that he sent to Mr. and Mrs. Polikowsky?

A. No, he sent letters to me keeping me advised as to the negotiations, but I do not recall having seen this letter.

Q. Well, did he send you copies of letters he sent to them in order to keep you advised as to the negotiations?

A. I do not remember having received any, although he kept me posted by letters on the negotiations, directly to me.

Mr. Blanche: That is all.

Redirect Examination

By Mr. McDonnell:

Q. Mr. Schmidt, under cross-examination you have been asked if you encumbered this property in any way and you answered, no. Was there some reason you did not borrow the money?

Mr. Blanche: To which I object.

Mr. McDonnell: The matter has been opened up on cross-examination.

The Referee: Oh, yes, it is a perfectly proper question. You opened it up.

Mr. Blanche: I didn't open up as to why he didn't encumber it, if your Honor please.

The Referee: You asked him if he did and he said, no. [16] It is perfectly proper.

The Witness: The reason the property was not

(Testimony of Kenneth P. Schmidt.)

encumbered was the fact we were approximately three weeks or 30 days from completing our engineering and having the map recorded under the State Subdivision Act, which is a requirement prior to recordation of any encumbrance for construction loan purposes.

Mr. McDonnell: I see. That is all the questions I have—just one second.

Q. Mr. Schmidt, are you now the sole owner of all the stock of Kenneth P. Schmidt Builders, Inc.?

Mr. Blanche: He has already testified that he was.

The Referee: Yes.

The Witness: Well, I would like to correct that.

Mr. Cahill: He couldn't so testify because he never has been.

The Witness: I never have made that statement, I don't believe.

Mr. Blanche: May I call the Court's attention to——

Mr. McDonnell: Well, I think that would go to the weight of the evidence rather than to its admissibility.

The Referee: Well, this theory of alter ego don't appeal to me at all because you have got to go beyond the mere fact that a man owns all the stock of a corporation to raise the alter ego theory. You have to show some inequity, fraud or injustice would be committed. You have [17] shown nothing of that kind yet. You will find cases which hold that the

(Testimony of Kenneth P. Schmidt.)

mere fact that a man owns all the stock of a corporation is not grounds for disallowance of his claim in bankruptcy. It is the same proposition. If you think you can show there is any fraud, inequity or injustice in Mr. Schmidt's dealings with the public and with your people, assuming he owned all the stock, that is one thing, but you haven't done that.

(Argument and discussion between the Court and counsel.)

The Referee: Well, let's see now. This case says if the vendor does any act manifesting an intention on his part not to rely on the lien.

All right, what did they do here? First of all, they agree that he can put construction loans on the property and he could put enough on there to absorb the value of the property. All right, they said we will take a second deed of trust, it might be worthless, but they changed that then. They said, "Well, we won't require a second deed of trust. We will rely on his personal signature and his wife's signature."

What more could they do to manifest an intention to waive their vendor's lien? And then there is also the contents of those escrow instructions that say it shall be free of all liens except taxes and assessments, and there is one California case right on the point which says that is a waiver of the vendor's lien. [18]

Mr. Blanche: Well now, I want to go into that,

(Testimony of Kenneth P. Schmidt.)

if the Court please, too. I am going to insist on this corporate alter ego——

The Referee: Well, you will have to do that with some other court. That is your privilege, but I think you are barking up the wrong tree.

Mr. Blanche: I do want the record to show. Of course, the question was whether or not Mr. Schmidt was the alter ego of the corporation.

Mr. McDonnell: No, the question was is he or is not the owner of all the stock.

Mr. Blanche: I am objecting to that. I say that has already been asked and answered.

The Referee: No, we will take the testimony again. Let's get the facts. You might use that transcript for impeachment, if you wish.

Q. (By Mr. McDonnell): Mr. Schmidt, do you at the present time own all the stock of the Kenneth P. Schmidt Builders, Inc.?

Mr. Blanche: Well, what he owns at the present time is incompetent.

The Referee: Not at the present time, but at the time of this transaction.

Q. (By Mr. McDonnell): At the time of the purchase of the property from the Polikowskys, did you own all the capital stock of Kenneth P. Schmidt Builders, Inc.? [19]

A. No, sir, but I would like to explain to clear up the whole thing about the ownership of the stock exactly.

The Referee: Go ahead.

(Testimony of Kenneth P. Schmidt.)

Q. (By Mr. McDonnell): As of that time now this is.

A. There has only been one condition of the stock since its inception, but I would like to explain it before the Court.

The Referee: Go ahead.

Mr. McDonnell: Go ahead.

The Witness: I held all of the stock when the corporation was formed in my name and it was kept in Thomas Walker's office, the attorney. He formed the corporation. For a certain period—then a certain period passed and my two brothers were working for me, one running the Paint Department and the other one running carpenters, and so forth, and they expressed a desire to own part of the corporation. So I sold approximately 20 per cent of the stock to my father. Now, I don't know where the stock is. I asked Mr. Cahill about four months ago. I don't think he knows.

The Referee: Did you sell it to your father before this Polikowsky transaction?

The Witness: Yes.

The Referee: Go ahead now.

The Witness: And I gave my brothers an option after a certain period, if they had the money and did right, they could own some of the stock. But the only transfer of stock [20] has been to my father, 20 per cent of it.

Q. (By Mr. McDonnell): Your brothers did not exercise the option?

(Testimony of Kenneth P. Schmidt.)

A. No, sir. I don't know where the stock is. Maybe it is still in Tom Walker's office.

The Referee: How much of the stock did your brother get?

The Witness: He didn't get any. He got an option. The only stock that has been transferred, was to my father.

The Referee: Then when you dealt with the Polikowskys, you held 80 per cent and your father 20 per cent of the stock; is that right?

The Witness: Yes, sir, and if I made the other statement I didn't understand it.

Mr. McDonnell: I have no further questions.

The Witness: I think the thing I told Mr. MacArthur was that I controlled the corporation.

Recross-Examination

By Mr. Blanche:

Q. Well, I would like to read your testimony taken before this Referee——

The Referee: Let him read it first and then you can question him about it.

Q. (By Mr. Blanche): On Tuesday, November 19, 1953, reading about line 14, page 10.

A. Well, if I said it I said it, but it is [21] not——

The Referee: No, just answer the questions now. Have you read it?

The Witness: Yes, sir.

The Referee: All right, now, wait for Mr. Blanche.

(Testimony of Kenneth P. Schmidt.)

Mr. Cahill: I will ask the witness to read starting at line 11, not line 14. It sets a certain time, December 5, 1952.

The Referee: What page is it?

Mr. Cahill: Page 10, your honor. There is a limitation of time that is long after the Polikowsky transaction.

Mr. Blanche: Oh, well, wait, Mr. Cahill. Just read the testimony.

The Referee: Just ask your question, Mr. Blanche.

Mr. Blanche: I will read the whole thing.

The Witness: I have read it.

Mr. Blanche: (Reading.)

“The Referee: When you say at that time, are you referring to the date of December 5, 1952?”

“The Witness: Yes, sir.

“Q. (By Mr. Blanche): Do you know who the stockholders were at that time?”

“A. There has been only one stockholder, and that is myself.

“Q. Do you own all of the stock of the corporation? A. Yes, sir.”

Q. You gave that testimony at that time, did you not? [22] A. Yes, sir.

The Referee: Have you any explanation to make of it now?

The Witness: Yes, I do, your Honor. I would like to explain it.

The Referee: Take your time and explain it.

The Witness: It is a peculiar situation. After my father purchased stock, he paid \$20,000 for

(Testimony of Kenneth P. Schmidt.)

it and then the corporation—he decided to get out or go into some other deal, he was dissatisfied with it, and I had a piece of property in Glendora I was ready to subdivide, consisting of about 90 lots, and I said, “Here is a chance to make around a hundred thousand dollars”; and I said, “I will tell you what I will do, you invested in the corporation and you would like to have some profit on the transaction and I will trade you the Glendora subdivision deal, which is all ready to start, for your stock back.”

And I said, “Furthermore, you are my father, it is such a good deal I will guarantee you if you lose money on the building project, I will still return your \$20,000. I don’t want you to lose any money.”

So we made a verbal deal and the subdivision was developed successfully. So morally I feel that he has been repaid for his stock and I own all the stock, although I do not hold it. It is one of those transactions that hasn’t been completed. [23]

The Referee: Does he still have the stock certificate?

The Witness: Well, I think it is in Mr. Walker’s office. I do not know.

The Referee: Who is Mr. Walker?

The Witness: He is the attorney that formed the corporation. So I hope you understand that at that time when I said I owned all the stock, morally I feel that I do, but I do not hold all the shares.

The Referee: All right, the next question.

Mr. Blanche: That is all.

Mr. McDonnell: I have no further questions.

The Referee: All right, you are excused.

Well, we will recess now.

(Recess.)

The Referee: Mr. Cahill, don't you think you ought to amend the schedules? The schedules are incomplete.

Mr. Cahill: Yes, your Honor, I will tell you what I did with that. I conferred with Mr. Laugharn. I conferred with Mr. Laugharn at very great length and discussed the problems there, and particularly those escrows laying out with the Glass Escrow Company in horrible shape. Mr. Laugharn said, "Let us, the Trustee and his attorney, gather everything and we will present that to you and then you prepare amended schedules"; and I agreed to do that.

The Referee: All right. Now, Mr. Blanche, take that [24] alter ego theory of yours, isn't this the answer to it. The alter ego theory is based on this: A man can't own a corporation and mask behind it and then when things go wrong try to limit the creditors to the assets of the corporation, if by doing so it brings about inequity, fraud or injustice. In other words, the corporate veil can be pierced and the man's own assets can be reached.

Now, here what have we got? We have got the corporation. If we pierce the veil and say Mr. Schmidt is the alter ego, you have his assets, too, because he signed the instrument.

So it seems to me that is the complete answer to that corporate veil proposition. Even assuming there was inequity, fraud or injustice, you have got not only the corporation's assets but his and his wife's assets.

(Argument and discussion between the Court and counsel.)

The Referee: All right, let's go ahead.

Mr. Blanche: I will call Mr. MacArthur. The Court has cut me off on my argument on the corporate veil, but I would like this testimony in.

The Referee: I will hear from you later.

H. T. MacARTHUR

called as a witness on behalf of the Petitioners, being first duly sworn, testified as follows:

Mr. Blanche: I have a book from the Title Insurance & [25] Trust Company which designates the form used in their standard title insurance policies, and I discussed this with Mr. Otis, and I have told both Counsel—Mr. Otis is the Chief Counsel for the Title Company—and he tells me their form has not been changed since 1950 and it is the form set forth in this booklet. Both counsel have agreed I can introduce—what I wanted to introduce is Schedule B, which is appended to all standard policies.

The Referee: What has that to do with this case?

Mr. Blanche: The Court has continuously stated

(Testimony of H. T. MacArthur.)

we guaranteed a clear title. We guaranteed to give them——

The Referee: I didn't say you guaranteed anything. I said you are bound by what you say in your instruments.

Mr. Blanche: We agree to give them a standard policy of title insurance.

The Referee: It doesn't say any such thing. It says: "showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation, free of encumbrances, except all general and special taxes, including personal property taxes, including special district levies."

Mr. Blanche: The Court has got to read back of that. Let me read it. "Kenneth P. Schmidt Builders, Inc., will hand you a trust deed and note for \$20,000 as described below."

Now, there has been no change in that except as to the trust deed and note. [26]

"And any additional funds and documents required from me to enable you to comply with these instructions, which you are authorized to use and/or deliver provided on or before November 30, 1952, instruments have been filed for record entitling you to procure Title Insurance & Trust Company Standard Owner's or Joint Protection policy of title insurance, with title company liability for the amount of total consideration on real property in the County of Los Angeles, State of California, viz.,," which means namely, title showing free and clear.

(Testimony of H. T. MacArthur.)

The Referee: All right, was there a title policy issued?

Mr. Blanche: I don't care. That is all they agreed to do, give them a title policy showing title free and clear.

The Referee: Oh, no, they agreed to give them title free and clear of liens.

Mr. Blanche: Your Honor, they agreed to give them a Title Insurance & Trust Company policy showing the following—

The Referee: Do you disregard this other provision in here entirely?

Mr. Blanche: That doesn't even make a sentence unless you put that "namely" in there.

The Referee: You say those are conflicting?

Mr. Blanche: Not at all. What does "viz." mean? It means "namely." [27]

The Referee: I know. You mean this clause, "Standard Owner's or Joint Protection policy of title insurance," conflicts with the clause later saying that the title should be vested in the corporation free of encumbrances except all general and special taxes, including personal property taxes, and also including any special district levies?

Mr. Blanche: No, your Honor, it defines what that means. It says, "We will issue a Title Insurance & Trust Company policy showing free and clear of encumbrances, showing the following, namely, free and clear of encumbrances."

The Referee: All right, what is wrong with that? "Free and clear of encumbrances" means, according

(Testimony of H. T. MacArthur.)

to one California case, free and clear of vendor's liens.

Mr. Blanche: I am not making myself clear. They guarantee to give them a title policy showing it free and clear of encumbrances. They don't guarantee to give them title free and clear of encumbrances.

The Referee: Of, that is specious, Mr. Blanche. You know the tile is clear whether the policy is right or wrong.

Mr. Blanche: What they guarantee is record title. I cited a United States Supreme Court case——

The Referee: That don't help you a bit.

Mr. Blanche: They agreed to give them title free and clear of encumbrances of record. You have got to read that whole sentence. [28]

(Argument and discussion between the Court and counsel.)

Mr. Blanche: May I make this added statement, and it is not specious, the title policy says——

The Referee: Can you get a copy here by 2 o'clock?

Mr. Blanche: I don't think so. They will have to make me up one. Mr. Schmidt should have it. One was issued from escrow.

Mr. McDonnell: Was it?

The Referee: I want it in here by 2 o'clock. I want to get this over with. Let's not discuss what is in the policy until we see it. I don't want to hear

(Testimony of H. T. MacArthur.)

any more about it until we get the policy and then we will see if that in any way varies the situation.

Now, if you want to take a few minutes out to call them, or if you want to have a subpoena issued, we will recess for a few minutes.

Mr. Blanche: Well, I can get a subpoena issued in the noon recess, I think.

The Referee: It is the Title Insurance & Trust Company?

Mr. Blanche: Yes.

The Referee: Oh, they are very co-operative.

Mr. Blanche: They are very co-operative.

The Referee: Let them make a copy of it and if there is any expense let the estate pay it. [29]

Mr. Blanche: I may say that I talked to Mr. Lawrence Otis, the Chief Counsel, and he tells me that their title policy carries the Schedule B——

The Referee: I don't care what he says. I have great confidence in Mr. Otis. Whenever I get in trouble I call him, but we are talking about a written instrument and let's see what is in it.

Mr. Blanche: Very well, your Honor.

Mr. Cahill: Your Honor, may Mr. Schmidt be excused? He is working at Newport Beach.

The Referee: It is all right with me unless counsel needs him.

Mr. McDonnell: I don't have any reason for keeping him here. Do you, Mr. Blanche?

Mr. Blanche: I don't think of any reason I need him.

(Testimony of H. T. MacArthur.)

The Referee: All right, you may be excused, Mr. Schmidt.

We will take a short recess in this case while I take up another matter here.

(Recess.)

The Referee: Go ahead now, Mr. Blanche.

Mr. Blanche: Call Mr. MacArthur.

H. T. MacARTHUR

recalled, testified further as follows:

Mr. Blanche: While they are reading this letter I wanted to introduce, I might go ahead. [30]

Direct Examination

By Mr. Blanche:

Q. Mr. MacArthur, you had some discussions with Mr. Schmidt——

The Referee: Let's identify Mr. MacArthur first for the record.

Mr. Blanche: I beg your pardon. He has already testified previously in this case. That is why I didn't.

The Referee: I didn't recall.

Mr. Blanche: I will be glad to do it again.

The Referee: What is your first name?

The Witness: H. T. I haven't testified before.

Q. (By Mr. Blanche): Have you been sworn?

A. Yes, I have been sworn now, I have been here before, but I have not testified.

The Referee: Go ahead now.

(Testimony of H. T. MacArthur.)

Q. (By Mr. Blanche): Mr. MacArthur, you are the Mr. MacArthur who with Mr. Duncan negotiated the sale of this property to Mr. Schmidt?

A. Yes, sir.

Q. And Mr. and Mrs. Polikowsky were your clients; is that correct? A. Yes, sir.

Q. And you recall some discussions which were had between you and Mr. Schmidt, concerning release clauses to be placed in the first trust deed and the like? [31] A. Yes, sir.

Q. Now, do you recall some discussion at that time in connection with some assurance that any houses placed thereon would be completed?

A. Yes, sir.

Q. Will you state what that discussion was?

A. I reported to Mr. Schmidt that Mr. and Mrs. Polikowsky were very much interested in insuring themselves against the possibility of the houses possibly being half completed or mechanic's liens developing wherein it would jeopardize their note that they were taking at that time on a trust deed basis.

The Referee: You are referring now to the trust deed that was contemplated in the original escrow instructions?

The Witness: Maybe it would be easier if I would kind of review briefly the history of this.

The Referee: Why not let him tell the story?

Mr. McDonnell: Surely.

The Witness: Well, your Honor, I haven't read back over it. It is some time ago, but this is what is in my mind. At the outset I was given exclusive list-

(Testimony of H. T. MacArthur.)

ing of this property at a price of \$25,000——

The Referee: You say an exclusive listing. You mean by that you were given an exclusive listing by Mr. and Mrs. Polikowsky?

The Witness: That is right, at a price of \$25,000, on [32] which they agreed to pay me a 5 per cent commission or a 5 per cent fee on any other amount which might be acceptable to them, obtainable through any offers; and Mr. and Mrs. Polikowsky do not spend much time in their Pasadena home, making it necessary for correspondence to some town in Northern California.

So Mr. Schmidt knew a salesman in our office by the name of W. W. Duncan, and I did not know Mr. Schmidt. Mr. Duncan came to me with the verbal proposition from Mr. Schmidt offering to pay \$21,500 for the property, who stated that he was just winding up a large subdivision matter approximating \$900,000 of homes in Monterey Park, and that he would buy this land provided he did not have to pay the money for a period of six months.

It seemed a silly proposition, but it is the duty of us in the real estate business to at least inform the sellers of any propositions obtained. So I wrote to Mr. and Mrs. Polikowsky in this Northern city and explained the offer, together with comments as to who Mr. Schmidt was.

The Referee: Have you got that letter here?

Mr. Blanche: The letters are in, I believe.

Mr. McDonnell: Well, is that the letter of October 5, counsel, which is Petitioners' Exhibit 1?

(Testimony of H. T. MacArthur.)

The Witness: I believe it was about October——

Mr. McDonnell: Let me ask counsel, Mr. MacArthur. We are trying to straighten out the record is all. [33]

The Referee: I will get it here. Petitioners' Exhibit No. 2. That is dated October 10, 1952, addressed to—no, that isn't it.

Mr. McDonnell: There are two letters, one dated October 5 and one dated October 10.

The Referee: Oh, yes, dated October 5, 1952, Petitioners' Exhibit 1, addressed to Mr. and Mrs. Polikowsky. Is that the letter you refer to? Just take a look at it.

The Witness: Yes, sir. Shall I go on?

The Referee: Yes, you go on because that is already in evidence. Go ahead with your story. Then what happened after you sent that letter?

The Witness: Included in that letter, if I remember right, there is a statement to the effect that it would be a complicated legal procedure to consummate the transaction even if Mr. and Mrs. Polikowsky would be interested in the reduced price of \$21,500 from their listing price of \$25,000, and that it would necessitate legal advice and aid beyond the ability of we as realtors to handle; that if such an offer would be acceptable they could accept it with that proviso, that the legal arrangements to insure the completion of the houses and release clause arrangements be made.

So that offer of \$21,500 was accepted subject to the arrangements legally.

(Testimony of H. T. MacArthur.)

I do not remember how much time went by after that, but I would guess in the neighborhood of two weeks, and [34] Mr. Schmidt called on me again, and incidentally, I handled all the matters thereafter. Mr. Duncan had merely told the man about the property at the outset.

Mr. Schmidt reported that it appeared it was going to cost a whole lot more to subdivide the land, put in streets and utilities, and so forth, than had been originally expected. Therefore, having not signed up on any basis and not having put up any deposit, he felt free to alter the offer that he had submitted verbally and that we have relayed by letter to an offer of only \$19,000, and Mr. and Mrs. Polikowsky countered with an offer of \$20,000, which counter——

Q. (By Mr. Blanche): Now, before we go any further, Mr. MacArthur, I will show you a letter of October 24th. Did you write that letter to Mr. and Mrs. Polikowsky? A. Yes.

Q. And that is the letter in which——

A. That is dealing with what I just mentioned.

The Referee: Any objection to the introduction of this?

Mr. McDonnell: No, your Honor.

The Referee: I will receive it in evidence.

Mr. McDonnell: It will be Petitioners' Exhibit 5.

Mr. Blanche: I would like to go into it a little further.

The Referee: This is off the record. [35]

(Testimony of H. T. MacArthur.)

(Discussion off the record.)

The Referee: We will recess now until 2 o'clock and you go in my chambers and get the Title Company on the phone. Will this take very long?

Mr. Blanche: No, it won't.

The Referee: Then you go ahead with this first if you want to.

Q. (By Mr. Blanche): I would like to ask you particularly with reference to page 2, there is a statement in this letter, "The property would be acquired in the name of Kenneth P. Schmidt Builders, Inc. Mr. Schmit is president and sole owner of all the stock. He has stated that he would be willing to personally sign the note in addition to the signature of the corporation."

Now, did you have a conversation with Mr. Schmidt at or about that time?

A. This letter is dated October 24th—

The Referee: He just asked you, if you had a conversation with him at or about that time, yes or no.

Q. (By Mr. Blanche): Prior to that letter?

A. Yes, beginning October 5th.

The Referee: All right.

Q. (By Mr. Blanche): Well, you had a conversation with Mr. Schmidt in connection with the contents of that particular paragraph?

A. Yes, sir. [36]

Q. And what did he say in that regard? Did he say to you that he was the sole owner of the stock?

(Testimony of H. T. MacArthur.)

A. That is right.

Mr. McDonnell: I will object to that. Let's not lead the witness.

The Referee: That is too leading. You ask him what he said. Petitioners' Exhibit 5, I will mark this letter. Just what did he tell you along that line?

PETITIONER'S EXHIBIT No. 5

The MacArthur Co.

Realtors

24 No. Marengo Avenue, Pasadena 1, California

Telephone SYcamore 3-4108

October 24, 1952.

Mr. and Mrs. C. E. Polikowsky,

Box 41,

Happy Camp, California.

Dear Mr. and Mrs. Polikowsky:

Last Wednesday Mr. Kenneth P. Schmidt called in person at our office with the report of his engineers and the City of Pasadena, showing the estimated cost to subdivide including the street, sewers, underground wiring and other utilities at a cost of \$12,700, which is \$2,700 higher than had been tentatively estimated.

\$21,500 less \$2,700, equals \$18,800, the resulting firm amount of Mr. Schmidt's verbal offer to start out with at the time of his call. We suggested that the \$18,800 offer be at least "rounded off" at \$19,000. Then, after obtaining his approval to \$19,000, we

(Testimony of H. T. MacArthur.)

reminded him that some one would have to put up the money for escrow and title company expenses and that it would not appear fair in this particular deal to ask you to pay out money in a deal involving no down payment. We took a rough guess that your share of such expenses in an outright sale at \$150. So, Mr. Schmidt offered to pay his own share of escrow expenses and not to exceed \$150 of your side of such expenses in addition. In effect, that would mean an offer of \$19,150 wherein each party pays his own customary expenses in escrow. In other words, after obtaining his estimates of total costs to subdivide, he now offers \$19,150 on a firm basis, on the general terms and conditions outlined in our letter to you dated October 5, 1952.

Last Wednesday, Mr. Schmidt expected that we would prepare such an offer in formal manner for his signature to mail to you by the next day. After consulting our attorney, we found that legal expense would become involved to draw up such an offer in final detailed manner, covering the bond improvement and special wording pertaining to the note in the amount of \$19,000 after taking Mr. Schmidt's check for the \$150. Hence, it was decided to telephone you the next day, which was yesterday. Not being able to reach you, word was left for a message to be placed in your post office box to call us reverse charges. Evidently, you did not pick up the message until this morning and then it was impossible for either one of us to hear the other and operator informed us that you had requested that

(Testimony of H. T. MacArthur.)

we write you this detailed letter by air mail. In the event you should entertain this offer in the amount of \$19,150, you should be prepared to engage the services of some attorney to represent you in working out the wordings of the \$19,000 note and the improvement bond with Mr. Schmidt's attorney. Hence, when you reply, we should be notified as to the attorney you desire to represent you. If you do not have some particular attorney in mind, as stated before in our letter dated October 5th, we can recommend Mr. Charles M. Fueller who is now already familiar with the type of deal.

You realize that I feel very close to you people, yet the truth is that it is difficult to recommend either a rejection or an acceptance of this offer. While it is true that I am supposed to be a specialist in appraising, it is also true that most appraisals are made by comparison with other similar properties sold on a similar basis—and there just are not other such recent past sales to use as a comparison. After working on this property diligently for some time, we now realize better than at the outset that there are very, very few eligible buyers for property of this kind in the first place; it requires considerable money and/or financial backing to improve the resultant lots to be created, carrying expenses, selling expenses, etc., all topped off by the fact that while this is a beautiful piece of property, it is something like an oasis in that the properties

(Testimony of H. T. MacArthur.)

and occupants not too far distant are not very beautiful.

With your own experience in the building and real estate business, I am inclined to believe that in this case I would prefer to lean on your advice if I were the owner and you were the real estate agent. Mr. Schmidt has not tackled this problem in any quick slip-shod manner. He has already incurred expenses in obtaining detailed item cost which he presented to us. If these costs are in line, he would still be paying the same amount of average cost per lot that would have applied if the subdivision costs had been the originally estimated \$10,000 instead of the more accurate estimate he now has of \$12,700.

There would be no other major changes from the proposal contained in our letter of October 5th. Additional minor items would include:

(a) The property would be acquired in the name of: Kenneth P. Schmidt Builders, Inc. Mr. Schmidt is president and sole owner of all the stock. He has stated that would be willing to personally sign the note in addition to the signature of the corporation.

(b) Mr. Schmidt would give us his check for \$150 to be used to apply on immediate title search and opening of escrow costs, but asks that his approval be obtained to the title company preliminary report.

(c) Mr. Schmidt already understands that the zoning is R-I, Class I, and would be purchasing the

(Testimony of H. T. MacArthur.)

property with no question in that regard; his engineers have already satisfied him that the land does not involve any filled-in ground problems, so property would be acquired "as is."

(d) The escrow would be handled by Mutual Savings and Loan Association, the firm he has negotiated with for the financing the construction of the eleven homes.

(e) The \$19,000 note (\$19,150 less the \$150 check), would become due and payable six months from the date of close of escrow, not six months from this date, in accordance with paragraph (4) of our letter of October 5th otherwise.

(f) The only items to be prorated in escrow would be real estate taxes and the 6% interest on the \$19,000 note; prorations would be as of date of close of escrow, not to exceed 30 days from the date of opening the escrow provided that you have complied with everything you agree to do on your side of the agreement.

(g) All fees, charges and prorations to be borne by the seller and the buyer in escrow in the manner customary between sellers and buyers except as agreed to otherwise herein.

(h) The manner of payment of the commission fee in the amount of 5% of the total selling price would be at your option of the following two plans: the commission fee could be paid by you at the close of escrow, or we could take your notes bearing the same interest rate that Mr. Schmidt would be paying on that same amount, 6%, beginning the

(Testimony of H. T. MacArthur.)

interest at the same date and the notes falling due the same date as Mr. Schmidt's note. The reason there would be two notes instead of one is that one of our associates, within this office, developed this prospective dealing, and the commission fee would be divided 60-40, 60% to W. W. Duncan and 40% to The MacArthur Co.

I have purposely written these several pages of detailed information in an effort to post you on all matters; it is best to do so in my opinion wherein I lack the benefit of sitting with you discussing various points.

Kindest personal regards,

/s/ HAROLD T. MacARTHUR.

HTM:t

Received in evidence March 4, 1954.

The Witness: I think I could explain better.

The Referee: No, just tell us what he said to you about the corporate stock of this corporation, Mr. Schmidt.

The Witness: This was news about the corporation——

The Referee: How is that?

The Witness: This was brand new news——

The Referee: No, just tell us what he told you.

The Witness: He said he wanted the title to be vested in the name of the corporation because it was one and the same thing anyway.

(Testimony of H. T. MacArthur.)

The Referee: Because it was what?

The Witness: It was one and the same thing.

The Referee: Well, that is what he told you?

The Witness: Yes.

The Referee: All right, the next question.

Q. (By Mr. Blanche): Well, was there any discussion about bonds? A. Yes, sir. [37]

Q. Bonds for completion of houses?

A. Yes, sir.

Q. And was there a discussion that in the event a release clause would be had with reference to a second trust deed that there should be some bond concerning the completion of the houses?

Mr. McDonnell: Just a moment. I don't want to keep these objections up, but let the witness tell us what Mr. Schmidt said.

The Referee: No, he is directing his attention to some particular matter. He asked him if there was any discussion. The question calls for a yes or no answer.

Mr. McDonnell: All right.

Q. (By Mr. Blanche): You answered yes?

A. Yes.

Q. What was that discussion?

The Referee: Before we get into that, we had better recess until 2 o'clock and you go in my room and telephone Mr. Otis so we can get that paper here at 2 o'clock.

(Whereupon, a recess was taken until 2 o'clock p.m.) [38]

March 4, 1954, 2 P.M.

The Referee: All right, Kenneth P. Schmidt Builders.

Mr. Blanche: If your Honor please, I have a man here from the Title Company with a copy of the title policy.

The Referee: We don't need to put him on the stand. They will stipulate.

Mr. Blanche: Counsel has been very nice to stipulate. I will offer this.

The Referee: Any objection to this copy?

Mr. McDonnell: Not as a copy, but we do not wish to stipulate to its admissibility, your Honor.

The Referee: But as far as this being a copy, that is so stipulated?

Mr. McDonnell: Yes.

Mr. Blanche: I am sure it is. The man is here from the Title Company.

The Referee: You don't need him for anything more.

Mr. Blanche: I want to offer it, if your Honor please.

The Referee: Well, let the man go back to his business now. Go ahead now.

Mr. Blanche: I would like to offer this, if the Court please, as the Petitioners' Exhibit.

The Referee: Any objection?

Mr. McDonnell: Yes. I will object to the introduction of that in evidence, your Honor, on the ground it does [39] not prove or tend to prove any issue in the case. I believe the title policy is irrelevant in this matter.

The Referee: Well, but the escrow instruction calls for this policy to be issued, doesn't it?

Mr. McDonnell: Yes, but I can't see how that determines whether there was a vendor's lien on the property or not.

The Referee: Well, under the circumstances I think it is just as competent as evidence as what you are offering.

Mr. McDonnell: Well, I have made my objection. If your Honor overrules it, all right.

The Referee: Petitioners' Exhibit No. 6.

PETITIONERS' EXHIBIT No. 6

1012 6-53

California Land Title Association

Standard Coverage Policy Form

Copyright 1950

Fee \$85.00

Policy of Title Insurance

Issued by

Title Insurance and Trust Company

of Los Angeles

Title Insurance and Trust Company, a corporation, of Los Angeles, California, herein called the Company, for a valuable consideration paid for this policy of title insurance, the number, date, and amount of which are shown in Schedule A, does hereby insure the parties named as Insured in Schedule A, together with the persons and corporations included in the definition of "the insured" as

set forth in the stipulations of this policy, against loss or damage not exceeding the amount stated in Schedule A which the insured shall sustain by reason of:

1. Title to the land described in Schedule A being vested, at the date hereof, otherwise than as herein stated; or

2. Unmarketability, at the date hereof, of the title to said land of any vestee named herein, unless such unmarketability exists because of defects, liens, encumbrances, or other matters shown or referred to in Schedule B; or

3. Any defect in, or lien or encumbrance on, said title, existing at the date hereof, not shown or referred to in Schedule B; or

4. Any defect in the execution of any mortgage or deed of trust shown in Schedule B securing an indebtedness, the owner of which is insured by this policy, but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon said land; or

5. Priority, at the date hereof, over any such mortgage or deed of trust, of any lien or encumbrance upon said land, except as shown in Schedule B, such mortgage or deed of trust being shown in the order of its priority in Part Two of Schedule B; all subject, however, to Schedules A and B and the Stipulations herein, all of which schedules and stipulations are hereby made a part of this policy.

In Witness Whereof, Title Insurance and Trust

Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers on the date shown in Schedule A.

[Seal] TITLE INSURANCE AND
TRUST COMPANY,

By /s/ W. HERBERT ALLEN,
President.

Copy of Policy. No additional liability assumed.
HF

Schedule A

1012A 8-53

California Land Title Association

Standard Coverage Policy Form

Copyright 1950

Amount: \$20,000.00

Policy No.: 3746551

Date: February 10, 1953, at 8 A.M.

Insured

Kenneth P. Schmidt Builders, Inc., a Corporation.

1. The title to said land, is at the date hereof,
vested in:

Kenneth P. Schmidt Builders, Inc., a Corporation.

2. Description of land in the county of Los Angeles, state of California, title to which is insured by this policy:

That portion of Lot 1, in Tract 1032, in the city Pasadena, as per map recorded in Book 17, Pages 142 and 143 of Maps, in the office of the county recorder of said county, except that portion thereof described as follows:

Beginning at a 4-inch pipe monument set at the most northwesterly corner of said Lot 1; thence North $82^{\circ} 22' 32''$ east along the northerly boundary line of said Lot 1, a distance of 18.85 feet to a 2 by 2 stake set at the northeasterly corner of said Lot 1, said corner being in the westerly line of Armada Drive, formerly San Rafael Drive, as said drive is shown on said map of Tract 1032; thence southerly along the said westerly line of Armada Drive formerly San Rafael Drive through an arc concave easterly of $44^{\circ} 32' 36''$ having a radius of 135.06 feet, a distance of 105 feet to a 4-inch cement pipe monument set in said westerly line of Armada Drive; thence South $82^{\circ} 25'$ west a distance of 21.65 feet to a 4-inch pipe monument set in the westerly boundary line of said Lot 1; thence North $7^{\circ} 35'$ west along the said westerly boundary line of Lot 1, a distance of 102.32 feet to the point of beginning.

Schedule B

This policy does not insure against loss by reason of the matters shown or referred to in this Schedule except to the extent that the owner of any mortgage or deed of trust shown in Part Two is expressly insured in paragraphs numbered 4 and 5 on page 1 of this policy.

Part One: This part of Schedule B refers to matters which, if any such exist may affect the title to said land but which are not shown in this policy:

1. Taxes or assessments which are not shown as

existing liens by the records of any taxing agency or by the public records; and easements, liens or encumbrances which are not shown by the public records.

2. Rights or claims of persons in possession of said land which are not shown by the public records.

3. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land, or by making inquiry of persons in possession thereof, or by a correct survey.

4. Mining claims, reservations in patents, water rights, claims or title to water.

5. Any laws, governmental acts or regulations, including but not limited to zoning ordinances, restricting, regulating or prohibiting the occupancy, use or enjoyment of the land or any improvement thereon, or any zoning ordinances prohibiting a reduction in the dimensions or area, or separation in ownership, of any lot or parcel of land; or the effect of any violation of any such restrictions, regulations or prohibitions.

Part Two: This part of Schedule B shows liens, encumbrances, defects and other matters affecting the title to said land or to which said title is subject:

1. Second installment general and special county taxes for the fiscal year 1952-1953 (Code area 4332 Parcel No. 52-29-1). Amount \$206.95.

2. Right for the constructing, placing and repairing of all telephone and electric light poles

along the property line of said land which adjoins the property immediately adjoining Seco Street, no cross-arms or any poles, however, shall extend more than 3-feet over the property line as reserved in deed from The Arroyo Park Corporation, a corporation, recorded in Book 239, Page 68, Official Records.

3. The effect of an instrument declaring said land restricted against occupancy by persons of other than the white or Caucasian races, executed by Angie W. Cox and A. S. Cox, as owners of said land, and by other persons, as owners of other parcels of land in said tract and vicinity, recorded prior to February 15, 1950, in Book 17720, Page 161, Official Records.

Stipulations

1. Scope of Coverage

This policy does not insure against, and the Company will not be liable for loss or damage created by or arising out of any of the following: (a) defects, liens, claims, encumbrances, or other matters which result in no pecuniary loss to the insured; (b) defects, liens, encumbrances, or other matters created or occurring subsequent to the date hereof; (c) defects, liens, encumbrances, or other matters created or suffered by the insured claiming such loss or damage; or (d) defects, liens, claims, encumbrances, or other matters existing at the date of this policy and known to the insured claiming such loss or damage, either at the date of this policy or at the

date such insured claimant acquired an estate or interest insured by this policy, unless such defect, lien, claim, encumbrance or other matter shall have been disclosed to the Company in writing prior to the issuance of this policy or appeared at the date of this policy on the public records. Any rights or defenses of the Company against a named insured shall be equally available against any person or corporation who shall become an insured hereunder as successor of such named insured.

2. Defense of Actions. Notice of Actions or Claims to Be Given by the Insured.

The Company at its own cost shall defend the insured in all litigation consisting of actions or proceedings against the insured, or defenses, restraining orders, or injunctions interposed against a foreclosure of sale of said land in satisfaction of any indebtedness, the owner of which is insured by this policy, which litigation is founded upon a defect, lien, encumbrance, or other matter insured against by this policy, and may pursue each litigation to final determination in the court of last resort. In case any such litigation shall become known to any insured, or in case knowledge shall come to any insured of any claim of title or interest which is adverse to the title as insured or which might cause loss or damage for which the Company shall or may be liable by virtue of this policy, such insured shall notify the Company thereof in writing. If such notice shall not be given to the Company at least two days before the appearance day in any such litigation, or if such insured shall not, in writ-

ing promptly notify the Company of any defect, lien, encumbrance, or other matter insured against, or of any such adverse claim which shall come to the knowledge of such insured, in respect to which loss or damage is apprehended, then all liability of the Company as to each insured having such knowledge shall cease and terminate; provided, however, that failure to so notify the Company shall in no case prejudice the claim of any insured unless the Company shall be actually prejudiced by such failure. The Company shall have the right to institute and prosecute any action or proceeding or do any other act which, in its opinion, may be necessary or desirable to establish the title, or any insured lien or charge, as insured. In all cases where this policy permits or requires the Company to prosecute or defend any action or proceeding, the insured shall secure to it in writing the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the insured for such purpose. Whenever requested by the Company the insured shall assist the Company in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, prosecuting or defending such action or proceeding, to such extent and in such manner as is deemed desirable by the Company, and the Company shall reimburse the insured for any expense so incurred. The Company shall be subrogated to and be entitled to all costs and attorneys' fees incurred or expended by the Company, which may be recoverable by the insured in any litigation carried on by the Company on be-

half of the insured. The word "knowledge" in this paragraph means actual knowledge, and does not refer to constructive knowledge or notice which may be imputed to the insured by the public record.

3. Notice of Loss. Limitation of Action

A statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within sixty days after such loss or damage shall have been ascertained. No action or proceeding for the recovery of any such loss or damage shall be instituted or maintained against the Company until after full compliance by the insured with all the conditions imposed on the insured by this policy, nor unless commenced within twelve months after receipt by the Company of such written statement.

4. Option to Pay, Settle, or Compromise Claims

The Company reserves the option to pay, settle, or compromise for, or in the name of, the insured, any claim insured against or to pay this policy in full at any time, and payment or tender of payment of the full amount of this policy, together with all accrued costs which the Company is obligated hereunder to pay, shall terminate all liability of the Company hereunder, including all obligations of the Company with respect to any litigation pending and subsequent costs thereof.

5. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this policy, it shall be subrogated to and be entitled to all rights, securities, and remedies which

the insured would have had against any person or property in respect to such claim, had this policy not been issued. If the payment does not cover the loss of the insured, the Company shall be subrogated to such rights, securities, and remedies in the proportion which said payment bears to the amount of said loss. In either event the insured shall transfer, or cause to be transferred to the Company such right, securities, and remedies, and shall permit the Company to use the name of the insured in any transaction or litigation involving such rights, securities, or remedies.

6. Option to Pay Insured Owner of Indebtedness and Become Owner of Security

The Company has the right and option, in case any loss is claimed under this policy by an insured owner of an indebtedness secured by mortgage or deed of trust, to pay such insured the indebtedness of the mortgagor or trustor under said mortgage or deed of trust, together with all costs which the Company is obligated hereunder to pay, in which case the Company shall become the owner of, and such insured shall at once assign and transfer to the Company, said mortgage or deed of trust and the indebtedness thereby secured, and such payment shall terminate all liability under this policy to such insured.

7. Payment of Loss and Costs of Litigation. Indorsement of Payment on Policy.

The Company will pay, in addition to any loss

insured against by this policy, all costs imposed upon the insured in litigation carried on by the Company for the insured, and in litigation carried on by the insured with the written authorization of the Company, but not otherwise. The liability of the Company under this policy shall in no case exceed, in all, the actual loss of the insured and costs which the Company is obligated hereunder to pay, and in no case shall such total liability exceed the amount of this policy and said costs. All payments under this policy shall reduce the amount of the insurance pro tanto, and payment of loss or damage to an insured owner of indebtedness shall reduce, to that extent, the liability of the Company to the insured owner of said land. No payment may be demanded by any insured without producing this policy for indorsement of such payment.

8. Manner of Payment of Loss to Insured

Loss under this policy shall be payable, first, to any insured owner of indebtedness secured by mortgage or deed of trust shown in Schedule B, in order of priority therein shown, and if such ownership vests in more than one, payment shall be made ratably as their respective interests may appear, and thereafter any loss shall be payable to the other insured, and if more than one, then to such insured ratably as their respective interests may appear. If there be no such insured owner of indebtedness, any loss shall be payable to the insured, and if more than one, to such insured ratably as their respective interests may appear.

9. Definition of Terms

The following terms when used in this policy mean: (a) "named insured"; the persons and corporations named as insured in Schedule A of this policy; (b) "the insured": such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage or deed of trust shown in Schedule B, the owner of which indebtedness is named herein as an insured, (2) any such owner or successor in ownership of any such indebtedness who acquires the land described in Schedule A or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any governmental agency or instrumentality acquiring said land under an insurance contract or guarantee insuring or guaranteeing said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said land as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c) "land": the land described specifically or by reference in Schedule A and improvements affixed thereto which by law constitute real property; (d) "date": the exact day, hour and minute specified in the first line of Schedule A (unless the context clearly requires a different meaning); (e) "taxing agency": the State and each county, city and county, city and district in which said land or some part thereof is situated that levies taxes or assessments on real property; (f) "public records": those public records which, under the

recording laws, impart constructive notice of matters relating to said land.

10. Written Indorsement Required to Change Policy

No provision or condition of this policy can be waived or changed except by writing indorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, or an Assistant Secretary of the Company.

11. Notices, Where Sent

All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at the office which issued this policy.

Received in evidence March 4, 1954.

Mr. Blanche: I will call Mr. MacArthur again.

H. T. MacARTHUR

recalled, testified further as follows:

Direct Examination
(Resumed)

By Mr. Blanche:

Q. I believe you testified this morning in connection with the letter and were testifying with reference to any question concerning completion bonds with reference to houses to be built by Mr. Schmidt. Was there any discussion between you and Mr. Schmidt about bonds, completion bonds?

(Testimony of H. T. MacArthur.)

A. Considerable.

Q. And was that immediately prior to the amendment of the escrow instructions, that is a matter of weeks before the amendment of the escrow instructions? [40]

A. That is right.

The Referee: Was it between the original and the amended escrow instructions, or before the original instructions?

The Witness: The beginning of the whole deal, before we even went to escrow.

The Referee: That is what we want to know.

Q. (By Mr. Blanche): Was there any discussion after the first instructions were put in about completion bonds?

A. Yes.

Q. And what was the discussion, that is between you and Mr. Schmidt?

A. Mr. Schmidt telephoned me to state that it was impossible to even obtain a bond backing up actual completion of the contemplated several houses, which I verified by checking with insurance companies, and I found that it is possible to get a contractor to build a house for you and to get a bond guaranteeing the completion, but that in this particular case it might not be that there would even be any houses built.

Q. Was there any discussion had between you and Mr. Schmidt whereby the desire of the Polikowskys in connection with bonds was discussed?

Mr. McDonnell: Just a moment. I will object to that question unless it is answered yes or no.

(Testimony of H. T. MacArthur.)

The Witness: I didn't hear it anyway. [41]

(Record read as follows: "Q. Was there any discussion had between you and Mr. Schmidt whereby the desire of the Polikowskys in connection with bonds was discussed?")

The Witness: Yes.

Q. (By Mr. Blanche): What was that discussion, the discussion between you and Mr. Schmidt concerning what the Polikowskys wanted, if anything?

Mr. McDonnell: I am going to object because there is insufficient foundation. We can't tell when this discussion took place, your Honor.

The Referee: You can find out preliminarily where it took place and who was present and when.

Q. (By Mr. Blanche): You have heard the testimony of Mr. Schmidt with reference to telephone conversations and conversations with you; is that right? A. Yes.

Q. Now, do you recall at any particular time when any conversation in connection with the desirability on the part of the Polikowskys for completion bonds was discussed with Mr. Schmidt? Can you identify the place of the conversation?

A. In my office, prior to going to escrow.

Q. Was Mr. Schmidt personally present or did he talk to you on the telephone?

A. Well, there was more than one conversation. The [42] last time was when he called me to tell me it couldn't be done.

(Testimony of H. T. MacArthur.)

Q. And was that prior to the amendment of the escrow instructions? A. Yes.

The Referee: Well, was that prior to the original instructions?

The Witness: Yes, sir. May I explain it this way, that I went over without the benefit of either the buyer or seller being present to dictate the preparation of the instructions, and at that time I provided for the understanding that there would be a bond to guarantee completion inasmuch as Mr. Polikowsky did not want to risk any mechanic's liens and so forth. You see, he is a contractor by profession, Mr. Polikowsky is.

The Referee: I understand. Next question.

Q. (By Mr. Blanche): And finally it was determined that that type of a completion bond could not be obtained; is that right?

A. That is right.

Q. Now, was that before or after the agreement was first put in escrow? As I understand it, you said that the first agreement provided for a completion bond, the first escrow instructions?

A. Yes.

The Referee: Is that right? [43]

Mr. Blanche: He just got through testifying to that.

The Referee: I know, but he might be mistaken.

The Witness: It was not agreed to.

The Referee: You are right, the original escrow

(Testimony of H. T. MacArthur.)

instructions provide this: "The acceptance by the seller of the bond or bonds put up by the buyer to guarantee the completion of the street and utility improvements on the property."

The Witness: Yes.

Mr. McDonnell: Let me ask the witness a question on voir dire, your Honor.

The Referee: Go ahead.

Mr. McDonnell: Mr. McArthur, when you say "completion bonds," do you refer to street improvement bonds or do you refer to a bond guaranteeing the completion of the homes?

The Witness: Two bonds, one for the completion of the tract, which is necessary by law, the other for completion of all the houses.

Mr. McDonnell: And when you say "completion bond," which of the two do you refer to?

The Witness: By "completion bond," I mean for the completion of the erection of the houses.

Mr. McDonnell: I see.

The Referee: But you look at these instructions now.

The Witness: That was not agreed to, your Honor. I went over and dictated that and Mr. Schmidt telephoned me, [44] which is the call I referred to a moment ago, stating that was impossible. No one had signed yet.

The Referee: The only thing in the escrow instructions concerning bonds was this about streets and utilities, no completion bonds.

Go ahead now. Next question, Mr. Blanche.

(Testimony of H. T. MacArthur.)

Q. (By Mr. Blanche): And after that the escrow instructions were subsequently amended; is that right?

A. You mean about the release clauses?

Q. About deleting the——

The Referee: He is referring now to——

The Witness: To what I call completion bonds?

The Referee: He is referring now to what is known here as Petitioners' Exhibit 4 entitled "Amended Escrow Instructions," dated December 5, 1952. You remember that, don't you?

The Witness: Yes.

The Referee: Now, what is your question?

Q. (By Mr. Blanche): At that time there was no longer any possibility of obtaining completion bonds? A. That is right.

Q. You had a discussion with Mr. Schmidt and with Mr. Polikowsky? A. That is right.

Q. Did you discuss with Mr. Schmidt the requirement that there be completion bonds if they were to take a first [45] deed of trust, that is, if they were to take the property subject to a first deed of trust?

A. That is right, at the outset.

Q. And it became no longer possible to get a completion bond? A. That is right.

Q. When was it decided that—or was it a result of that discussion with reference to bonds or was it a result of something else that you had determined not to take a second trust deed at all?

A. Well, it was determined as a result of two

(Testimony of H. T. MacArthur.)

things, and that was one of the two things

The Referee: What was the other one?

The Witness: It was going to be quite difficult to arrange for the so-called release clauses and when he would put on loans to build these——

The Referee: These were construction loans?

The Witness: The property had not been subdivided yet and we didn't know the number of lots that would exist. It would be impossible to sell the property without having specific lot numbers to refer to for releases on payment of certain amounts, and that, together with not being able to arrange for completion bonds for the buildings, made it appear as though the deal would be absolutely impossible on the basis we had started out. We couldn't refer to any legal descriptions for respective lots even. [46]

The Referee: Well, your original escrow instructions referred to construction loans and the amended instructions do not delete that clause.

The Witness: It eliminated it.

The Referee: What?

The Witness: There is nothing about any release clauses in the amended escrow instructions.

The Referee: I don't mean release clauses. I mean construction loans.

The Witness: In other words, he didn't ever have to build on it at all.

The Referee: No, but the original escrow instructions, they provide—here is the way it reads: "It is un-

(Testimony of H. T. MacArthur.)

derstood that the above trust deed will be subordinated to the lien of 11 construction loans made by any Savings & Loan Association, made by the buyer for the construction of improvements on property. Subordination agreement to be incorporated in deed of trust when recorded.”

You recall that instruction, don't you?

The Witness: Yes.

The Referee: Now, when you had the amended instructions that clause was not deleted, it still remained because the amendment did not refer to it. You just look at it. In other words, he still was to be allowed to get construction loans. The only deletions, you see, or the only deletion was the deed of trust to be subordinated to construction [47] loans. That was to be left out.

The Witness: It says all references to the trust deed and note for \$20,000 are deleted. In other words, it would not be possible to subordinate it.

The Referee: In other words, the trust deed was eliminated.

The Witness: That is right.

The Referee: But the construction loan proposition still remained?

Mr. Blanche: Well, if the Court please, there is no purpose in worrying about construction loans unless they have——

The Referee: I can't help it. I am going by the instruments themselves. It is Greek to me.

The Witness: I don't believe I got your point clear.

(Testimony of H. T. MacArthur.)

The Referee: Try it again.

The Witness: You can say 11 houses but you can't have 11 legal descriptions when it hasn't been subdivided.

The Referee: I understand all that.

The Witness: So it would be impossible to arrange for those clauses.

The Referee: To arrange for construction loans?

The Witness: Yes. You see, this is 5 acres.

The Referee: I don't care whether you could arrange for it or not. The original instructions called for construction loans. The amendment did not delete that. I can't [48] read it any other way.

Next question.

Mr. Blanche: That is all.

The Referee: Cross-examination.

Cross-Examination

By Mr. McDonnell:

Q. I don't know about other persons in this courtroom, Mr. MacArthur, but I am not clear on some of the testimony you have given. So let's see if I can clarify it in my own mind.

Now, you have told us about the time between the first escrow instructions and the amended escrow instructions. Is that right? Have you been examined concerning that period?

A. That is right. I am doing the best I can from memory.

Q. I appreciate that. It is probably my confusion, not yours. Do I understand your testimony

(Testimony of H. T. MacArthur.)

that the change was made from the first to the second escrow instructions because there was no legal description? Is that the reason?

A. Two reasons.

Q. Yes. What were they?

A. I am trying to repeat it just like I did. No. 1, it turned out to be impossible to obtain such a thing as I am calling a completion bond for the completion of the houses. No. 2, it would be impossible to provide in advance for release clauses to 11 different parcels without having [49] the benefit of any description of what they would be. They could be cut up into 11 parcels in every old way possible, yet it is necessary in advance when he would obtain individual Building & Loan Company loans on 11 parcels to have that knowledge in order to be able to release those certain portions.

Q. Well, now, as to the so-called construction bonds, didn't I understand your testimony that you knew before the first escrow instructions that it was not going to be possible to get construction bonds? Wasn't that your testimony?

A. No. What I believe happened is that they just typed it over again since it wasn't signed. I went in and gave instructions and no one signed it and Mr. Schmidt called me and said it was impossible.

Q. Well, before the first escrow instructions were signed you knew they couldn't get construction bonds?

A. Yes.

(Testimony of H. T. MacArthur.)

The Referee: Don't call it construction bonds. Call it completion bonds.

Mr. McDonnell: Completion bonds. I'm sorry.

Q. Now, if it was known before the first escrow instructions were signed, how could it have had any effect on the changes which occurred when the second instructions were signed, the changes?

A. How could it have had any effect—— [50]

Q. I mean, here is something you knew before the first instructions were signed. How could that have affected the signing of the amendment to the escrow instructions?

A. In this way, that either the deal had to be cancelled entirely or else take a personal note. It wouldn't be possible to complete the deal the first way.

Q. You mean——

A. The way all my letter correspondence and everything and the deal had been prepared.

Q. So you set up a new way in the first escrow instructions?

The Referee: Let me get this clear now. You say either the deal had to be cancelled or it could be put through by taking a personal note?

The Witness: That is right.

The Referee: And that is what happened, wasn't it?

The Witness: Yes. It would not be possible on our original plan to take a trust deed with release clauses.

The Referee: I see.

(Testimony of H. T. MacArthur.)

Q. (By Mr. McDonnell): Now, did you and Mr. Schmidt discuss the change from the first escrow instructions to the second escrow instructions?

A. Yes.

Q. And you discussed those changes after the first escrow instructions were signed; is that right?

A. More than once. [51]

Q. Can you recall the substance of those conversations, what was said?

A. Well, the first one I mentioned is when he phoned me, and it was news to me that the so-called completion bonds are not obtainable. I write insurance in a very small way, and so I checked with——

Q. That is before the first escrow instructions, isn't it?

A. This is the escrow that was prepared that no one signed.

Q. That is right. I want to know what happened after the first escrow was signed?

A. After the first escrow was signed?

Q. Right.

A. The first escrow was signed by the seller and about two months or so went by before Mr. Schmidt even showed up to do any signing, and then he wanted an extension of time, I believe it was, twice. There wasn't any more discussion I can remember as far as the note or anything like that was concerned except for the prolonging of the six months' period from beginning to another date. I believe that would be about all.

Q. Was there any discussion about deletion of

(Testimony of H. T. MacArthur.)

the second trust deed after the first instructions were signed by the Polikowskys?

The Referee: What do you mean by the first trust deed? [52]

Mr. McDonnell: I mean second trust deed, after the first instructions were signed.

The Witness: It is hard to remember just exactly the date.

The Referee: Well, can this recall it to your attention? The original instructions call for a trust deed, didn't they, in favor of the Polikowskys?

The Witness: Yes.

The Referee: The amended instructions deleted that, cut that out?

The Witness: Yes.

The Referee: Now, was there any talk in between?

The Witness: Yes. I'll tell you, your Honor, I heard Mr. Schmidt testifying this morning. I could tell that he was trying his best also to remember, but he was a little bit in error in that, I believe, he testified that he suggested this personal note.

The Referee: You are the one that suggested it?

The Witness: Yes.

The Referee: I see.

Q. (By Mr. McDonnell): And what did you say when you suggested the personal note?

A. Just about what I said a little while ago, that it would seem——

The Referee: The deal could not be handled any other way? [53]

(Testimony of H. T. MacArthur.)

The Witness: The deal could not be handled any other way. We wouldn't have any descriptions.

Q. (By Mr. McDonnell): And did you suggest he obtain his wife's signature on the personal note instead of the second trust deed?

A. The very earliest correspondence, my letters showed that he volunteered that from the outset.

Q. But that wasn't on the first escrow instructions. I am trying to find out did you suggest that his wife sign instead of the second trust deed?

A. I'm beginning to remember some of this now. I believe the instructions sat there about two months without any signing on his part, and then he required some changes after it had been sitting there a long time, and then I do believe also that he alone went in and signed to start out with and that no one else signed except Mr. Schmidt personally for quite a spell.

The Referee: Well, did he sign personally or for the corporation?

The Witness: I wouldn't swear. I believe he just signed personally.

Mr. Blanche: He signed personally and for the corporation.

Mr. McDonnell: Both on the first escrow instructions.

Mr. Blanche: Both, individually and for the corporation. [54]

The Witness: I don't believe his wife did.

Mr. Blanche: Not on the first one, on the second one.

(Testimony of H. T. MacArthur.)

Q. (By Mr. McDonnell): Now, I call to your attention—you say there was a time lapse of about two months. The first escrow instruction was dated October 30th. The amendment was dated December 5th. That is a period of about a month and five or six days, something like that. A. Yes.

Q. Now, how long would you say that the first escrow instructions were unsigned now in view of the dates that are on them?

The Referee: That is unimportant.

Mr. McDonnell: Well, I want to try and establish when the conversations took place, your Honor. That is all.

The Referee: Yes, but we are getting a pretty clear picture here.

The Witness: I might have been mistaken in my estimate.

The Referee: It was some time anyway, some weeks.

Q. (By Mr. McDonnell): How long would you say after the first instructions were signed the second instructions were dictated?

A. After the first escrow instructions were signed by who?

Q. All right, by Mr. Schmidt? I show you Petitioners' [55] Exhibit 3, dated October 30, that is Escrow Instructions No. 1. A. Yes.

Q. How long after they were signed by Mr. Schmidt was it before the amended instructions, dated December 5, 1952, were prepared?

(Testimony of H. T. MacArthur.)

Mr. Blanche: I wonder if he knows when they were signed by Mr. Schmidt?

Mr. McDonnell: He testified two months, and that is what I am trying to find out.

Mr. Blanche: No, he testified they remained unsigned for about two months.

Mr. McDonnell: That is right.

The Referee: I don't think that makes any difference.

Mr. Blanche: I will withdraw any objection.

Mr. McDonnell: I will withdraw the question. May I have the other exhibits, if your Honor please?

The Witness: Is it all right if I say something?

The Referee: No, wait until they ask you a question.

Mr. McDonnell: May I crave the Court's indulgence just a second while I go through this exhibit?

The Referee: Yes.

Q. (By Mr. McDonnell): Mr. MacArthur, after you talked to Mr. Schmidt about the deletion of the second trust deed, did you communicate with the Polikowskys?

A. I either communicated or else they dropped in on [56] me in person.

Q. And did you discuss with them the fact that Mrs. Schmidt was going to sign in place of the second trust deed?

A. I had them go to escrow with Mr. Charles Fueller, and from the very outset, I believe it was

(Testimony of H. T. MacArthur.)

Paragraph 5, way back October 4th, my deal in making this commission was contingent upon being fully satisfied as to the legal arrangements. So that has always been my understanding, that it takes precedence over escrow instructions anyway.

Q. I must not have made my question clear to you. Let me rephrase it again. Did you discuss with the Polikowskys the changes which Mr. Schmidt proposed in the escrow instructions after the first ones were signed?

A. I stayed out of that because it is a legal question, although I do believe now that I reported that to Mr. Fueller, who advised them in that regard, and they went to escrow accompanied by Mr. Fueller.

Q. Had you advised them before they went to escrow with Mr. Fueller about the proposed changes in the escrow instructions?

A. I do not remember. I remember discussing them with Mr. Schmidt instead of Mr. Schmidt bringing it up to me. It was sort of my idea.

Mr. McDonnell: I think that is all the questions I have.

The Referee: Any redirect? [57]

Mr. Blanche: No redirect.

The Referee: You are excused. The next witness.

Mr. Blanche: That is all.

The Referee: Anything else?

Mr. Blanche: That is all.

Mr. McDonnell: I have no further testimony.

(Testimony of H. T. MacArthur.)

Mr. Blanche: I do have another question, if the Court please, one other question.

The Referee: From this same witness?

Mr. Blanche: From Mr. MacArthur.

The Referee: Go ahead.

Redirect Examination

By Mr. Blanche:

Q. Mr. MacArthur, do you recall any discussion about the period of the note being six months?

A. Yes, sir, from the outset.

Q. And was there any statement made by Mr. Schmidt to you as to where the consideration to pay the note was forthcoming from?

A. Yes, there was.

Q. And what statement did he make in that regard?

A. He stated that he was winding up the completion of a very large subdivision. The figures that he used were approximately \$900,000 worth of houses in the Monterey Park area near the old Middick Country Club, and that he would have the money shortly—six months would be more [58] than ample time; but the funds were going to come from that subdivision he was winding up.

Q. And do you know whether or not that subdivision was in the name of Kenneth P. Schmidt Builders, Inc.?

A. No.

Q. You don't know?

A. I have since heard it was. I have never verified it.

(Testimony of H. T. MacArthur.)

Mr. Blanche: That is all.

Mr. McDonnell: I have no further questions.

The Referee: That is all, Mr. MacArthur. There might be some question there of fraud. Maybe you are mistaken in your remedy there.

You are excused, Mr. MacArthur.

You might think about that, Mr. Blanche. If he made representations payment would be made in a certain way knowing it couldn't be, you might have a case of fraud, some kind of proceeding to set aside the entire transaction.

Mr. McDonnell: Your Honor, before we do close this matter I would like to make my record complete because apparently it will be reviewed. Here is the grant deed from Clarence E. Polikowsky and Winnifred Polikowsky to Kenneth P. Schmidt Builders, Inc., a California corporation.

The Referee: Yes, I think that should be in evidence.

Mr. Blanche: I think it should be. No objection.

The Referee: Trustee's Exhibit 1. [59]

Now, then, examining that policy of title insurance, I presume, Mr. Blanche, your point is that all this policy agrees to do, or what it does not agree to do, put it that way, is to cover easements, liens and encumbrances which are not shown by the public records.

Mr. Blanche: That is correct.

The Referee: Now, a vendor's lien, of course, is never shown by the public records, and your point is that this clause in the original escrow instructions

about title free and so on tied in with the title policy doesn't necessarily mean a waiver of the vendor's lien.

What about that, Mr. McDonnell?

Mr. McDonnell: Well, your Honor, I have inspected the escrow instructions and I think they are subject to another interpretation other than that which Mr. Blanche seeks to put upon them.

It is true the escrow instructions provide in part, "Kenneth P. Schmidt Builders, Inc., will hand you a trust deed and note for \$20,000"—I am reading from the first instructions—"for \$20,000, as described below, and any additional funds and documents required from me to enable you to comply with these instructions, which you are authorized to use and/or deliver provided on or before November 30, 1952, instruments have been filed for record entitling you to procure Title Insurance & Trust Company Standard Owner's or Joint Protection policy of title insurance." [60]

Now, I want you to note the next language: "With Title Company liability for the amount of total consideration on real property in the County of Los Angeles, State of California, viz."

Now, I have consulted Black's Law Dictionary. "Viz." is construed to mean "namely." "Namely" refers not to anything that comes thereafter but to the real property; and you will notice there is a place for it to be described, and then it says: "A portion of Lot 1 of Tract 1032, as per map recorded in Book 17, Page 142-3 of Maps, in the Office of the Recorder of said County, showing title vested in Kenneth P. Schmidt Builders, Inc., a corporation."

Now, there is nothing to restrict, connect, tie, not even the most tenuous vinculum, the next paragraph which begins, I will call to your Honor's attention, with a capital letter indicating a new sentence and a new thought, "Free from encumbrances," and so forth, and that is the portion to which your Honor has had reference.

The Referee: Oh, no; I can't follow that.

Mr. McDonnell: Well, Mr. Blanche is attempting to link the provision for the standard title policy with the section which provides that the title itself will be conveyed free and clear of all encumbrances. I don't think they are bound together in the manner in which Mr. Blanche seek to link them.

Mr. Blanche: They are all in one sentence. There is [61] no predicate as pure rhetoric would require.

Mr. McDonnell: And pure rhetoric would indicate that the next sentence begin with capital letters.

Mr. Blanche: Where is the period?

Mr. McDonnell: The period is intended to be typed in after the "showing title vested in."

Mr. Blanche: That "free" is merely to emphasize. There is no predicate in it.

The Referee: Yes, there would have to be something to base the "free of encumbrances" on.

This will be Trustee's Exhibit No. 1, this deed. Well, I will take the matter under submission.

(Argument and discussion between the Court and counsel.)

The Referee: Well, there is another matter I

have to take up here now, so you find me that case in the meantime, Mr. Blanche.

(Recess.)

Mr. McDonnell: Your Honor, in the Kenneth P. Schmidt matter, may I make this suggestion, perhaps Mr. Blanche could send us a letter with the case in it. Would that satisfy your Honor? And in that way your Honor will have the matter in writing.

The Referee: That will be all right, yes. Then the matter will stand submitted. [62]

Certificate

I, H. A. Singeltary, hereby certify that on the 4th day of March, 1954, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, consisting of the evidence offered and received, objections of counsel and the rulings of the Court thereon, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this the 8th day of March, 1954.

[Seal] /s/ H. A. SINGELTARY,

[Endorsed]: Filed March 9, 1954, Referee. [63]
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 84, inclusive, contain the original Creditors' Involuntary Petition in Bankruptcy; Order of General Reference; Adjudication in Bankruptcy; Petition in Support of Order to Show Cause; Answer to Petition for Order to Show Cause; Answer of Kenneth P. Schmidt Builders, Inc., et al.; Memorandum Opinion re Waiver of Vendor's Lien; Findings of Fact, Conclusions of Law and Order on Petition in Reclamation of Clarence E. and Winnifred Polikowsky; Petition and Amended Petition for Review; Certificate on Review; Objections to Findings of Fact, etc.; Findings of Fact, Conclusions of Law and Order on Petition for Review of Referee's Order; Judgment on Petition for Review; Notice of Appeal; Petition and Order Extending Time to Docket Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Affidavit of Service which, together with Reporter's Transcripts of Proceedings on November 19 and 25, 1953, and March 4, 1954, and original Petitioners' Exhibits 1 to 6, inclusive, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this day of December, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 14606. United States Court of Appeals for the Ninth Circuit. Frank M. Chichester, Trustee in Bankruptcy for the Estate of Kenneth P. Schmidt Builders, Inc., Bankrupt, Appellant, vs. Clarence E. Polikowsky, Winnifred Polikowsky, Kenneth P. Schmidt and Mary Wilkins Schmidt, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14606

FRANK M. CHICHESTER, Trustee in Bankruptcy for KENNETH P. SCHMIDT BUILDERS, INC., Bankrupt,

Appellant,

vs.

CLARENCE E. and WINNIFRED POLIKOWSKY,

Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD ON
APPEAL

Comes now the Appellant, Frank M. Chichester, Trustee, and hereby adopts in this court the "Appellant's Statement of Points on Appeal" and "Designation of Contents of Record on Appeal," heretofore filed in this matter in the United States District Court, as his statement of points in this court and designation of record in this court.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1954.

